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92-627

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

CITY VENDING OF MUSKOGEE, INC.,

Petitioner,

v.

OKLAHOMA TAX COMMISSION,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I. IS THE COMMERCE CLAUSE A BAR TO THE STATE OF OKLAHOMA SHIFTING THE INCIDENCE OF TAXATION TO A WHOLESALER AND REVOKING ITS LICENSE FOR FAILURE TO PAY TAXES ON THE VERY SAME INDIAN INTRA-TRIBAL SALES WHICH THIS COURT HELD WERE EXEMPT FROM TAXES IN *OKLAHOMA TAX COMMISSION V POTAWATOMIE TRIBE*, 498 US ___, 111 S CT 905 (1991)?

II. IS THERE JUDICIAL AUTHORITY OR JURISDICTION IN THE OKLAHOMA STATE COURT TO EXPRESSLY REFUSE TO CONSIDER THE COMMERCE CLAUSE AS A DEFENSE AND REVOKE THE LICENSE OF A WHOLESALER SOLELY IN RELIANCE ON STATE LAW, OR IS THE DECISION IN ABSENCE OF A CONGRESSIONAL GRANT OF JUDICIAL AUTHORITY TO SO BURDEN THE FLOW OF COMMERCE AND VOID?

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JURISDICTION AND LITIGATION HISTORY

This court has jurisdiction pursuant to 28 USC § 1257 to review the July 14, 1992, final order of the Supreme Court of Oklahoma. (Attached hereto at page App. 1). The order arose from rehearing and reversed an earlier judgment of the Oklahoma court. (Attached hereto at page App. 47). Certiorari was previously granted to review an opinion of the court of appeals. (Attached hereto at page App. 94). The trial court had previously granted an injunction (attached hereto at page App. 101) which arose from the original opinion of the Oklahoma Tax Commission. (Attached hereto at page App. 104).

CONSTITUTIONAL PROVISION RELIED UPON

Article 1, § 8, Cl. 3 of the Constitution states, "Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with Indian Tribes."

STATEMENT OF THE CASE

For several years the Indian tribes in Oklahoma have purchased tax free cigarettes in interstate commerce and distributed them to tribal or individual tribesman stores for retail. City Vending of Muskogee, Inc. (City Vending) was a tobacco wholesaler located in Oklahoma who wished to also participate in commerce with Indian tribes. State statutes made no provision related to taxation of sales to Indians. As an in-state wholesaler, City

Vending did have to maintain a continuous audit of all sales of cigarettes for review by the Oklahoma Tax Commission (OTC). City Vending relied solely upon the Commerce Clause and the teachings of this Court, that Tribes could make intratribal sales tax-free, in making the decision to sell tax-free cigarettes to Indian tribes.

OTC immediately assessed taxes on the sales and revoked the wholesale tobacco license of City Vending. City Vending protested on the grounds that the tax placed an undue burden on the Indian Commerce Clause and was also a reverse discrimination against the in-state wholesaler who was denied opportunity to compete with interstate wholesalers on the sales. OTC ruled that they did not have jurisdiction of the Constitutional defense and that since the state statutes made no exemption of taxes on sales to Indian tribes, taxes must be assessed and the license revoked. City Vending did not appeal the decision and asserted that the judgment was void on the grounds that state tribunals do not have jurisdiction to usurp the plenary power of Congress and place undue burdens on commerce with Indian tribes.

The Supreme Court of Oklahoma first agreed and ruled that no judicial authority had been granted to the Oklahoma tribunals to assess the taxes and that the decision was void *ab initio*. The court on rehearing reversed and found that City Vending had the burden to prove that all the subsequent retail sales were made to tribal members, and consequently tax was due on all sales made to the tribes. The court found that amendments to the statutes in 1991 and 1993 now address a procedure to provide for proper accounting of taxable retail sales. The

tribes continue to this day to purchase tax-free cigarettes in interstate commerce and avoid accounting to the state.

The Constitutional defense pursuant to the Commerce Clause was first raised before OTC in the written protest. The defense was raised in the pleadings at each level of appeal thereafter and is referred to by each tribunal in the opinions which are attached hereto.

I. THE COMMERCE CLAUSE ISSUE

In a sister case before this Court involving some of the same sales, the retail sales by the tribe to tribesmen were held to be tax-free upon sovereign immunity grounds. *Oklahoma Tax Commission v Potawatomie Tribe,* 498 US ___, 111 S Ct 905 (1991). In the final opinion herein, the Supreme Court of Oklahoma decided that those very sales may be taxed at the wholesale level.

City Vending has no standing to claim sovereign immunity. The defense of City Vending to the taxes arises from the assertion that the Oklahoma state tax laws cannot be read out of context of the Constitution and evade the mandate of the Indian Commerce Clause by placing an undue burden on commerce with Indian tribes. The Supreme Court of Oklahoma has now held City Vending liable for collecting the taxes on the retail sales which this Court held in *Potawatomie* could not be collected by the state.

The case of *Washington v Confederated Tribes,* 447 US 134 (1980) and other cases cited therein approved state schemes which taxed Indian sales to non-tribal members for the express reason that those taxes "do not burden

commerce that would exist on the reservations without respect to the tax exemption." *Id.* at 157. State statutes in those cases required the tribes to account for and pay taxes on all retail sales to non-tribesmen.

Oklahoma had no statutes on the subject. Oklahoma tribes have the right under the above stated authorities to obtain tax-free cigarettes for resale to tribesmen. The tribes obtained them freely in interstate purchases. City Vending asserted an equal right to enter such commerce and made tax-free sales to the tribes. That was the only way City Vending could enter commerce with the tribes for resale in tax exempt intratribal sales. Using the audit required of in-state wholesalers, OTC assessed taxes on the sales and revoked the license of City Vending.

The Supreme Court of Oklahoma held that the burden was on City Vending to prove what retail sales made by the tribes were exempt although the state had no statutory scheme and City Vending had no power to obtain the information from the tribes. The case is contrary to the facts in *Confederated Tribes* where the court approved a state scheme of taxes specifically because it did not burden commerce in which Congress has control of the federal interest. The rule in Oklahoma under the instant case is that OTC can pre-empt the plenary power of Congress by placing a burden on commerce in the form of taxation of the wholesaler in an area exempt of tax arising from other federal interests. It is all the more so an undue burden since the tax incidence is supposed to fall on the consumer and not the wholesaler.

City Vending did not attempt to avoid the state statutes as the entities did whose shipments were confiscated

in *Confederated Tribes*. As Justice Kauger noticed in the dissenting opinion in the attached Appendix, City Vending carefully followed the statutes.

The impossibility of City Vending escaping the undue burden placed on commerce is placed in perfect perspective in the concurring opinions. City Vending had no procedure to become the wholesaler in the chain of commerce leading to the federally exempt resale. The burden arose from a choice to either abstain from commerce with the tribes or pay taxes on all subsequent retail sales arising from wholesale to the tribes with no means to recover from the consumer. There was no statutory procedure to require the tribes to report and be charged when retail sales were made which were not tax exempt. The Supreme Court of Oklahoma simply made City Vending liable for the taxes that this Court in *Potawatomie* ruled that the state could not collect from the tribes.

II. VOIDNESS ISSUE

The original opinion of the Supreme Court of Oklahoma carefully proceeded to the conclusion that the OTC decision was void for lack of subject matter jurisdiction to render the order citing *Vallely v Northern Fire and Marine Ins. Co.*, 254 US 348, 353 (1920). The later opinion only addressed the authority of OTC and the state court to deal with the general subject matter.

The concurring opinion of Justice Opala directly addressed the issue and applied the excess versus absence test of jurisdiction. He states that "even if intra-tribal sales were in fact taxed, their inclusion would not create a facial invalidity." He states that OTC has taxing

power and the wrongful inclusion of the federally exempt sales is merely an excessive exercise of the power. He then concludes the judgment is final and unappealable.

Jurisdiction can be raised at any time. *Id.* at 353. The *Vallely* opinion found that a bankruptcy court, with obvious subject matter jurisdiction of discharge in general, rendered a void judgment in "absence" of jurisdiction when an insurance company was discharged in bankruptcy. The statute mandated that an insurance company could not be discharged. The otherwise final order of the bankruptcy court was declared void because the court lacked authority to render the decision.

The Commerce Clause and the sovereign immunity of the tribes mandate that intratribal sales are tax-free. Congress has plenary authority over commerce with Indian tribes, *U.S. v Holliday,* 3 Wall 407, 417-418, 18 LEd 182 (1866), and has granted no authority to the Oklahoma courts to tax intratribal sales. The judgment to tax the sales is void for "absence" of authority of the court to render the decision just as the "absence" of authority was found in *Vallely* to discharge the insurance company in bankruptcy.

Justice Opala's finding of a mere excess of authority paints with too broad a brush even for Oklahoma. *Glover v Warner,* 274 P 867 (Okl 1929).

> Having decided that the statutes do not empower the county court, or any other court, with authority to authorize a mortgage to be executed on a minor ward's land for the primary purpose of paying taxes thereon or tax liens, any judgment assuming to authorize such

> for that particular thing is void, and is subject to collateral attack.

Justice Opala's test would result in reversal of *Glover* as well as *Vallely*. He would find general jurisdiction of the court in probate matters in *Glover* and of bankruptcy matters in *Vallely* and conclude that the order was only an "excess" of jurisdiction.

CONCLUSION

City Vending respectfully requests this court to find an undue burden on commerce in assessing the taxes and find that the resulting order revoking the wholesale license is void.

Respectfully submitted,

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SUPREME COURT OF OKLAHOMA

OKLAHOMA TAX COMMISSION, Appellee, v.
CITY VENDING OF MUSKOGEE, INC.,

Appellant.

No. 65,602. July 14, 1992

ORDER

The petition for rehearing of Appellee, the Oklahoma Tax Commission is granted and this Court's opinion promulgated on April 23, 1991 and reported at 62 O.B.J. 1377 is withdrawn and replaced by the opinion filed this date.

DONE BY ORDER OF THE SUPREME COURT THIS 14TH DAY OF JULY, 1992.

/s/ Ralph B. Hodges
Acting CHIEF JUSTICE

Certiorari to Court of Appeals, Div. 1, Appeal from District Court, Muskogee County, Hon. William Bliss, Trial Judge.

Oklahoma Tax Commission (OTC) sought to enjoin taxpayer from selling cigarettes without a license after OTC revoked taxpayer's license as a cigarette wholesaler for failure to affix excise tax stamps to cigarettes sold to Indians and/or Indian Tribes for resale within Oklahoma. The trial judge issued a permanent injunction. Taxpayer appealed contending the earlier revocation order of OTC was void for lack of jurisdiction. The Court of Appeals affirmed. Held: The earlier order of OTC was not void for lack of jurisdiction. We can find no error in the trial court's grant of a permanent injunction on this record and, accordingly, the trial court is affirmed.

CERTIORARI PREVIOUSLY GRANTED; COURT OF APPEALS OPINION VACATED; TRIAL COURT AFFIRMED.

J. Lawrence Blankenship, Robert C. Jenkins, David Hudson, Stanley Johnston, Office of General Counsel, Oklahoma Tax Commission, Oklahoma City, attorney for appellee.

Jon Tom Staton, Muskogee, attorney for appellant.

PER CURIAM: Appellant, City Vending of Muskogee, Inc. (City Vending), was an Oklahoma based wholesaler of cigarettes licensed by appellee, the Oklahoma Tax Commission (OTC).[1] Wholesalers are required to purchase and affix tax stamps to cigarette[2] with certain exceptions.[3] On May 31, 1985, after auditing City Vending, OTC mailed a proposed tax assessment to it for distribution and sale of unstamped cigarettes. OTC also sought to cancel and/or revoke City Vending's wholesale license for its failure to affix cigarette tax stamps.[4] City Vending protested the assessment and defendant against revocation of its license on two grounds. It argued the sales at issue were made to Indian Tribes and the transactions were therefore exempt by virtue of the Indian Commerce Clause of the United States Constitution. U.S. CONST. art. I, §8, cl. 3.[5] City Vending also asserted OTC discriminatorily applied the cigarette tax laws against in-state wholesalers, while not seeking any assessment against out-of-state wholesalers who also sold cigarettes to Indian Tribes. Presently, only the first defense is involved.[6]

The assessment and revocation matters were eventually combined, apparently by agreement of the parties, and were presented to an administrative law judge. After hearing(s) the judge issued Findings, Conclusions and Recommendations which recommended the protest be denied and the license canceled. OTC adopted the Findings, etc. of the administrative law judge as the Order the Commission. No appeal by City Vending was perfected to this Court as allowed by 68 O.S. 1981, §225 and the order was allowed to become final.[7]

Shortly after the order was issued OTC filed a proceeding in Muskogee County District Court to enjoin City Vending from continuing to sell cigarettes without a license. The instant appeal is from the trial judge's granting of the requested injunction.[8] City Vending claims the OTC order revoking its license was void *ab initio*, or facially void, for lack of jurisdiction.[9] The Court of Appeals found the order was not void, that it could and should have been the subject of appeal to this Court under §225 and because it was not it became final and impervious to collateral attack. Accordingly, the Court of Appeals affirmed the trial court's granting of a permanent injunction.

City Vending asserts the facial invalidity of the OTC order is contained in the following quotation from the administrative law judge's Findings, Conclusions and Recommendations: "[t]hat [OTC] is without jurisdiction to determine the constitutional questions presented and asserted by [City Vending]". It argues that because OTC was without authority to determine the constitutional defense(s) presented OTC was without jurisdiction to

enter any order revoking its license with the constitutional defense left unresolved. We do not agree.

Assuming, without deciding, OTC was without authority to determine the constitutional defense(s) because it has no power to either rule a legislative enactment unconstitutional or because it likewise lacks authority to grant an exemption from an unambiguous legislative taxing scheme that does not provide for the claimed exemption,[10] this does not mean a decision either to uphold a proposed tax assessment or to revoke a license like that at issue here is facially void. In a related case, the United States Court of Appeals for the Tenth Circuit stated:

> On appeal, [City Vending] asserts the OTC determination upholding the first tax assessment was void because the OTC did not have jurisdiction to consider the constitutional claims. This argument is unpersuasive because the OTC did not address the constitutional claims contrary to its authority, but rather held it lacked authority to consider those claims.[11]

Although we are not bound by the Tenth Circuit's determination and we realize the situation before it was presented in the context of a bankruptcy proceeding where only the tax assessment part of the order was in issue, we find its determination on the voidness issue to be persuasive. The simple fact is that although OTC may not have been able to determine the constitutional defenses raised by City Vending before it *we* had the authority to consider those defenses on appeal and City Vending cannot now claim the order of OTC was void

because it did not have authority to definitively determine the constitutional defenses.[12]

Normally our inquiry would end here. However, because City Vending claims all the sales it made were wholly exempt from state taxation by virtue of the Indian Commerce Clause and presumably that such fact ousted State authorities of all jurisdiction to tax any such sales, we feel compelled to answer the Commerce Clause question.

Although City Vending appears to admit in its submissions to this Court cigarettes it sold in this case to Indians and/or Indian Tribes for resale at the retail level by the tribes or tribally related smoke shops would only be tax exempt from the excise tax if made to members of the involved tribe it asserts its dealings are nonetheless completely tax exempt under the Indian Commerce Clause and State authorities must seek a remedy directly against a Tribe or the smoke shop retailer. We do not agree.

In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe Oklahoma,* 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), the United States Supreme Court held that retail sales of cigarettes by tribal sellers to nontribal members were subject to Oklahoma tax. 111 S.Ct. at 911. However, in the same opinion the Supreme Court held a Tribe could not be sued by State tax authorities because Indian Tribes retain sovereign immunity from nonconsensual suit by the State. *Id.* at 909-910. The Supreme Court realized this latter ruling barred the State from pursuing the most efficient remedy to collect taxes on nonexempt sales, i.e. sales to nontribal members. It

accordingly stated the following, "[a]nd under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation . . . or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores . . . . " (citations omitted) *Id.* at 912. Accordingly, City Vending is wrong that the Indian Commerce Clause exempts all sales by a wholesaler to an Indian Tribe.

One may, however, argue that because the State only has authority to tax final retail sales to nontribal members and OTC made no distinction in this case between sales at the retail level ultimately made to tribal members and those made to nontribal members it had no authority to revoke the license. We do not believe any such argument assists City Vending in the present case. No record has been presented to us which would show to whom the ultimate retail sales were made by the involved Tribes or smoke shops City Vending wholesaled cigarettes. This record only shows City Vending sold to Indians and/or Indian Tribes at the wholesale level for resale within Oklahoma. Once this fact is established, which without some exemption would be a violation of our cigarette tax laws, it was City Vending's burden to show some valid exemption existed which would make its sales tax exempt. The instant record does not show any such exemption.[13] Furthermore, in that only sales to tribal members would be exempt from the reach of Oklahoma's tax laws and the face of the record we have been provided does not explicitly show any retail sales to tribal members which would be exempt we cannot conclude OTC lacked jurisdiction to revoke City Vending's license nor that the trial court erred in permanently enjoining

City Vending from continuing to wholesale cigarettes after its license was revoked.[14]

Accordingly, the opinion of the Court of Appeals is Vacated and the trial court is Affirmed.

HODGES, VCJ.,
LAVENDER, SIMMS, HARGRAVE and
WATT, JJ., concur;
WILSON, J., concurs specially;
OPALA, CJ., concurs in judgment;
KAUGER and
SUMMERS, JJ., dissent.

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[1] Cigarette wholesalers were and are required to be licensed. 68 O.S. 1981, §304, now 68 O.S. 1991, §304. Although certain statutes involved in this case have been changed since the filing of the instant appeal and the proceedings occurring herein before the trial court and OTC, the statutorys provisions covering the instant matter are those found in the 1981 Oklahoma Statutes. Accordingly, references in this opinion will be to the 1981 versions of pertinent statutes, unless otherwise specified.

[2] 68 O.S. 1991, §305.

[3] *See e.g.* 68 O.S. 1991, §310 (exemption for cigarettes sold in interstate commerce after filing of proper bond) and 68 O.S. 1991, §321 (exemption for cigarettes sold to veteran's hospitals and state operated domiciliary homes for veterans for sale to ex-service men or women and sales to Untied States). City Vending does not argue either of these statutory exemptions were intended to apply to the sales at issue in this case.

[4] The relevant statute setting out the procedure to cancel a license granted by OTC for violation of the tax laws was 68 O.S. 1981, §212.

[5] U.S. CONST. art. I, §8, cl. 3 provides: Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes".

[6] The three issues and errors set forth in City Vending's petition in error and amendment to petition in error were as follows:

"1. Is the wholesale of cigarettes to an Indian Tribe exempt from state tax pursuant to the Commerce Clause?

2. Should the license have been revoked since City Vending has filed the case on the constitutional question, after paying the contested taxes, pursuant to 68 O.S. §226?

3. Was the order of the Tax Commission void due to the finding of the Tax Commission that it did not have jurisdiction of the issue involved upon which taxes were assessed and the subject license revoked?"

Errors not presented by the petition in error will not be considered on appeal *Kirschstein v. Haynes*, 788 P.2d 941, 955 (Okla. 1990); *Martin v. Harrah Independent School District*, 543 P.2d 1370, 1376 (Okla. 1976). In essence, the second defense raised by City Vending before OTC is based on an alleged reverse discrimination favoring interstate commerce and burdening intrastate transactions. We in no way view this second purported defense presented by the issues or errors set forth above. We further note in its initial brief of appellant City Vending also argued OTC should be estopped from any argument sales to Indian Tribes were not tax exempt. The assertion was based, in part, on a 1978 letter of an OTC official with the Sales and Use Tax Division of OTC to a Tribal Administrator of the Citizen Band Potawatomi Indians to the effect OTC recognized the tax exempt status for sales tax purposes of the Tribe's purchase of tangible personal property. City Vending says there should be no distinction between the sales tax and the cigarette excise tax involved here. City Vending also based its estoppel theory on OTC's alleged treatment of cigarette sales by out-of-state wholesalers to Indian Tribes as tax exempt and its treatment of the instant matter that the sales by City Vending, an in-state wholesaler, were not. We will not consider these arguments for the reason no estoppel argument was contained in the petition in error or the amendment to petition in error filed in this Court. *Id.*

[7] 68 O.S. 1981, §225(f) [now 68 O.S. 1991, §225(g)] provides an avenue to appeal directly to this Court any order, judgment, finding or ruling of OTC other than one assessing a tax. This provision clearly applies to a license revocation. Other subsections of §225 also would have allowed an appeal directly to this Court from that part of the final order assessing the tax. City Vending appears to allude in its certiorari petition to a rationale for its failure to appeal under §225, although it never even refers to §225 in its petition for certiorari. It appears to say it did not appeal, or, at least, follow through with an appeal under §225 to this Court, because OTC required a 3 million dollar bond to supersede the order of revocation. Section 225(f) allows a party to supersede the effect of an order, etc. of OTC by filing with OTC a bond in an amount fixed by OTC. We, of course, cannot consider any argument attempted to be raised by City Vending in relation to this bond issue for the reason an appellate court, in reviewing a matter on appeal, must have a proper record before it to review any claimed errors. *Eckel v. Adair*, 698 P.2d 921, 924-925 (Okla. 1984); *Holley v. Shepard*, 744 P.2d 945, 947 (Okla. 1987). There is nothing in the record presented to us in this appeal that such a bond was required by OTC to supersede the license revocation during the pendency of a §225 appeal. Furthermore, even if such a bond was required by OTC *to supersede the effect of the license revocation*, no such bond is required merely to appeal to this Court nor are we aware of any law which would prevent this Court from fashioning relief from an OTC requirement as to superseding the effect of the license revocation deemed inequitable or unnecessary, *if so requested by a party to an appeal.* However, in that no appeal was perfected under §225 from the OTC order no such request was ever made by City Vending. Finally, we note *no* issue concerning some unlawful prevention of an appeal under §225 is contained in the petition in error in this case and for this reason any such issued has been waived by City Vending and will not be considered by us. *Kirschstein v. Haynes*, supra note 6, at 955.

[8] In addition to the Muskogee County District Court case, City Vending filed an action in Oklahoma County District Court in December 1985 pursuant to 68 O.S. 1981, §226, contesting the tax assessment and praying for a declaration of

unconstitutionality of the tax assessment and a refund of the taxes paid. City Vending of Muskogee, Inc. v. Oklahoma Tax Commission, Case No. CJ-85-10772 (Okla. County Dist. Court). On application of OTC we assumed original jurisdiction in said case on March 17, 1986 and issued an order granting a writ of prohibition prohibiting any assigned judge from proceeding further in the case because of a failure to meet the 30 day time limitation imposed by §226(b) as interpreted in *Ladd Petroleum Corp. v. Oklahoma Tax Commission*, 619 P.2d 602 (Okla. 1980). Oklahoma Tax Commission v. The Honorable Joe Cannon, District Judge, Case No. 65,916 (Okla. S. Ct., unpublished order, March 17, 1986). City Vending does not challenge this ruling in its petition for certiorari nor does it challenge therein the Court of Appeals' ruling in their opinion in this case that §226 only provides an additional remedy as to a tax assessment, but does not provide an additional remedy or means of appeal as to a license revocation. Accordingly, these issues will not be considered by us as they have been waived by failure to present them in City Vending's petition for certiorari. *Ford v. Ford*, 766 P.2d 950, 952 n. 1 (Okla. 1988).

[9] A void judgment may be attacked at any time. *Hough v. Hough*, 772 P.2d 920, 921 (Okla. 1989). However, for a judgment to be void it must appear on the face of the judgment roll or record the court rendering the judgment lacked jurisdiction over the parties, the subject matter or the jurisdictional power to render the particular judgment. *Id.* Furthermore, extrinsic evidence of the lack of jurisdiction is not permitted. *Id.*

[10] We held in part in *Dow Jones & Co. v. Oklahoma Tax Commission*, 787 P.2d 843, 845 (Okla. 1990), that as an administrative agency OTC was powerless to strike down a statute for constitutional repugnancy.

[11] *City Vending of Muskogee, Inc. v. Oklahoma Tax Commission*, 898 F.2d 122, 125 (10th Cir. 1990), *cert. denied* 111 S.Ct. 75 (1990).

[12] *See also Dash, Inc. v. Alcoholic Beverage Control Appeals Board*, 683 F.2d 1229 (9th Cir. 1982). In *Das* liquor licensees contended California's procedure for revoking liquor licenses denied licensees procedural due process guarantees of the Fourteenth Amendment to the United States Constitution. The

licensees argued the process provided no meaningful opportunity to present constitutional defenses to license revocations. Licensees claimed that because article III, §3.5 to the California Constitution prohibited administrative bodies from declaring statutes unconstitutional or refusing enforcement of statutes on the basis of claims such statutes are unconstitutional and that review of administrative decisions to revoke a liquor license were limited to discretionary review before appellate courts, they were denied due process of law. The Ninth Circuit disagreed. It noted the California courts *did* have authority to consider the constitutional claims and that during the administrative hearings licensees were given the opportunity to present evidence relevant to all defenses raised, including their constitutional defenses. *Id.* at 1234. The Ninth Circuit further found that contrary to licensees' contention review in the California appellate courts was discretionary, review of the revocations in the appellate courts was as of right. *Id.* at 1235. Accordingly, the Ninth Circuit held the process received by the licensees satisfied the minimal procedural requirements of the Fourteenth Amendment Due Process Clause. *Id.* at 1235. City Vending did not raise as an issue or error in its petition in error or its amendment to petition in error filed in this appeal a challenge on due process grounds to the statutory process covering the revocation of a cigarette wholesaler's license. It did, however, allude to a purported lack of due process in its petition for certiorari as another basis for voidness of the OTC order. Like *any other issue* raised or attempted to be raised by City Vending in post-petition in error (or amendment thereto) submissions, whether based on due process or any other basis, such issues have been waived and will not be considered by us because issues or errors not raised in the petition in error will not be considered on appeal even if later contained in a brief or later submission of the appealing party. *See Martin v. Harrah Independent School District, supra* note 6 at 1376.

[13] City Vending has argued in at least one submission to this Court there was no evidence in the record before OTC that the Tribes it sold cigarettes to resold the cigarettes at the retail level. It, thus, appears to argue without such evidence all of its sales would be tax exempt because the Tribes or its members may have *consumed* all the cigarettes or merely again sold the

cigarettes at the wholesale level. Such arguments(s) are simply not viable on the present record. The Findings, etc. of the administrative law judge, as adopted by OTC in its Order of the Commission contains the following statement of fact:

> The facts at issue in the protest of City Vending of Muskogee, Inc. are not in dispute, being that [City Vending] has sold cigarettes to Indians and/Indian tribes for resale within the State of Oklahoma and therein failing to affix thereto cigarette excise tax stamps as required by the laws of the State of Oklahoma.

Findings, etc., pg. 3 at Original Record pg. 6.

We have been provided no transcript or other record of the administrative proceedings before OTC. In an appeal pursuant to §225 such an administrative record could have been presented to us as prepared by OTC, as certified to by the Secretary of the Commission, upon request of City Vending. 68 O.S. 1981, §225(b). Apparently, neither City Vending nor OTC made any effort to provide the administrative record to the trial court in this case. Only the Findings, etc. of the administrative law judge and the Order of the Commission were attached to the petition of OTC for injunctive relief filed in the District court of Muskogee County. Clearly, we view the above quote as indicating, at a minimum, that the cigarettes sold by City Vending were resold in Oklahoma and were not merely consumed by a Tribe or tribal members. The quote, however, does not explicitly say to whom the cigarettes were resold or that they were resold at the retail level. City Vending cannot now take advantage of this apparent uncertainty. The burden of proof to show an exemption from the tax laws was on City Vending. *Bert Smith Road Machinery Co., Inc. v. Oklahoma Tax Commission*, 563 P.2d 641, 643 (Okla. 1977); *See also Enterprise Management Consultants, Inc. v. Oklahoma Tax Commission*, 768 P.2d 359, 362 (Okla. 1988) (protesting taxpayer must sustain burden of proving tax assessment was erroneous). Furthermore, error may not be presumed from a silent record, but must be affirmatively demonstrated. *Eckel v. Adair, supra* note 7 at 924. City Vending has not affirmatively demonstrated on this record any of the Tribes or Indians it sold to did not resell

at the retail level or that any resales were made to tribal members.

[14] In that City Vending has failed to show on this record any of its sales were tax exempt we need not determine here *if it had* whether OTC's order of revocation would then be void and subject to collateral attack or whether instead it could merely be considered some type of voidable order subject only to attack on direct appeal because OTC exceeded its jurisdiction by assessing a tax and revoking the license even though some, but not all sales were shown to be tax exempt.

OPALA, CJ., (concurring in judgment) The court affirms today the trial court's judgment which permanently enjoins the wholesaler, City Vending, from selling cigarettes within the State without a license. While I do not accede to the court's pronouncement, I concur *insofar as the court declares that the Oklahoma Tax Commission's [Commission] order,* which assessed a cigarette excise tax against the wholesaler and revoked its license, *is not facially void for want of subject matter jurisdiction.* I am writing separately (a) to give prominence to that part of the court's opinion which discusses the consequences of our *Dow Jones'*[1] teaching that an agency is powerless to pass on the constitutionality of a statute, and (b) to emphasize that *an appeal directly from a final agency order is necessary to preserve the aggrieved party's constitutional challenge left unresolved in the process of administrative adjudication.*

I recede from the notion that the Commission order under scrutiny here is *totally free of facial infirmity apparent from the agency proceedings.* In my view an *excessive* exercise of taxing power may be inferred from even a casual inspection of these proceedings. This conclusion flows from the Commission's undifferentiated procedural approach to taxing (at the wholesale transaction level) *all cigarette sales to Indian tribes.* The critical assessment in contest here may well have included some portion attributable to federally exempt intratribal sales. While the fact of the Commission's proceedings is far from *simon-pure, the infirmity does not make the critical agency order facially void.* At a maximum, the assessment in question might be viewed as partly *excessive* or *improperly burdened* by the possible inclusion of an unauthorized levy component.

But even if the agency order could be perceived as an adjudication *in excess* of the Commission's *unquestionable* power to levy a cigarette excise tax,[2] its assessment in contest here is not facially *invalid*. It could hence stand impervious to collateral attack launched by the taxpayer in the district court action for injunctive relief.

I.

FAILURE TO RAISE AN UNRESOLVED CONSTITUTIONAL CHALLENGE BY APPEAL BROUGHT DIRECTLY FROM AN ADVERSE ADMINISTRATIVE DECISION MAKES THE AGENCY ORDER IMPERVIOUS TO A LATER COLLATERAL ATTACK ON CONSTITUTIONAL GROUNDS

Dow Jones[3] teaches that constitutional challenges lie outside the adjudicative competence of administrative agencies. Under per-*Dow Jones* practice, it was clearly understood that on an agency's failure to consider a constitutional challenge, the aggrieved party had to appeal lest the decision become final.[4] *Dow Jones does not disturb that time-honored rule of practice.*

An agency's want of competence to resolve a constitutional attack does not enable a party aggrieved by its decision to delay the challenge past a timely appeal. One may not *wait beyond an agency order's* finality to assert a claim of constitutional infirmity.

City Vending did not appeal from the Commission's order; rather, it pressed the order's constitutional infirmity as a defense against the district court injunction. Since the assessment in contest is *not facially void*,[5] City Vending's failure timely to appeal makes that agency

decision final and the interposed district court defense an impermissible collateral attack.

II

THE COMMISSION'S UNDIFFERENTIATED PROCEDURAL APPROACH TO TAXING CIGARETTES FOR SALE TO INDIAN TRIBES AT THE WHOLESALE TRANSACTION LEVEL IS AT BEST AN *EXCESS* RATHER THAN *ABSENCE OF* JURISDICTION

The administrative law judge's findings show the contested assessment against City Vending to be for the sale of cigarettes at the wholesale transaction level to "Indians and/or Indian tribes" for "resale" and "consumption within the State" and for "failing to affix thereto cigarette excise tax stamps." City Vending's license was revoked for distributing cigarettes without the required tax stamp. It is apparent on the face of the Commission proceedings that its procedure *did not distinguish between two distinct taxing categories – the ultimate sales to tribal and nontribal members.* From this undifferentiated procedural approach one could infer an infirmity apparent upon the face of the proceedings. The Commission may have indeed exceeded its taxing power by including in the contested assessment transactions that qualify as federal exempt intratribal sales. But even if intratribal sales were in fact improperly taxed, their inclusion would not create a facial invalidity. *The Commission's exercise of such unauthorized power is, at most, an act in excess but not in the absence of its jurisdiction.*

A.

The Distinction Between Excess and Absence of Jurisdiction

The law observes the distinction between *excess* and *absence* of jurisdiction over a given subject matter.[6] In the latter circumstance, judicial power to act at all is simply wanting.[7] For example, if a probate court whose authority is limited to wills and decedents' estates should conduct a criminal trial, its jurisdiction to decide any issue in the case is, without a doubt, entirely absent. On the other hand, when the authority to deal with a subject does exist, the *manner and extent* of the power's exercise, even if patently *excessive*, will stand, absent of course a direct attack.[8] If a court in vested with general jurisdiction over criminal cases should find some act or omission to be a public offense when by law it clearly is not, or should sentence a defendant to eleven years of imprisonment when the maximum confinement prescribed by statute is only ten, the decision would be *in excess* but not in the *absence of* the court's jurisdiction.[9]

These examples serve to distinguish the *absence* of jurisdiction from its *excess*. Our concern in this case is with the *consequences* flowing from those terms. When a complete *absence* of jurisdiction appears on the face of the judgment roll (or from an inspection of its administrative counterpart – the "agency proceedings"),[10] the court's ruling is, of course, *void* and subject to vacation on direct or collateral attack.[11] The tribunal's decision is deemed void *only* when the *face of the record* reveals that at least one of the three elements of agency jurisdiction was absent, i.e., jurisdiction over the parties, jurisdiction over

the subject matter or jurisdictional power to pronounce the particular decision that was rendered.[12] In contrast, an *excessive* exercise of cognizance does *not make the decision facially void and vulnerable to collateral attack.*[13] An agency order that is not facially void "is *valid until set aside,* and parties may be precluded from setting it aside by waiver, estoppel, or the passage of time."[14] Jurisdiction is not wanting but merely *exceeded* when a statute is misinterpreted or adjudicative authority is exercised erroneously.[15] If extrinsic evidence is needed to show the jurisdiction's absence, the decision is *not* facially invalid.[16] Firmly rooted in our jurisprudence,[17] these distinctions are applied to agency decisions that fall under the adjudicative rubric.[18]

B.

The Tax Commission Has Cognizance Of Federal-Law Issues

State courts have the constitutionally invested authority over any federal-law claim or issue not expressly withheld from their jurisdiction by an act of Congress.[19] Tribal sovereign immunity claims or defenses sought to be based on federal law must yield to this nation's dual sovereignty scheme and its dual court system. *Oklahoma Tax Commission v. Graham,*[20] *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma.*[21] In *Graham* the Court held that a tribal sovereign immunity counterclaim, pressed in a state-court suit to enforce a tax assessment against an Indian tribe for cigarette sales and bingo receipts, is not removable to a federal court. It stands cognizable in a state court. *Citizen*

Band teaches that tribal immunity *deprives neither state administrative institutions* of their power to tax tribal sales of goods (cigarettes) to nontribal members nor *state courts* of their authority to enforce the tax through "equitable remedies". There, the Court notes that while the Tribe's sovereign immunity bars the state from pursuing its most effective direct remedy to collect the taxes (a lawsuit against the Tribe), alternative procedural avenues avail. Individual tribal members employed in the Indian smokeshops may not claim tribal immunity. *States are hence free to collect from the wholesalers taxes on unstamped cigarettes supplied to tribal stores.*[22] Oklahoma's own decisional law foreshadowed *Citizen Band*. It had held a Tribe's immunity from taxes not to extend to tribal activities or transactions affecting nontribal members.[23]

While the federal government shares its tax immunity[24] with the Indian tribes (for whose benefit the government holds reservation lands in trust),[25] this immunity does not *ipso facto* extend to private entities doing business with the government.[26] Under the now repudiated "intergovernmental tax immunity doctrine",[27] state government could not tax income that an individual directly derived from any contract with the federal government. Today, unless Congress has expressly or impliedly acted to preempt state taxation, "a State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, *even though the financial burden of the fact may fall on the United States or tribe*".[28] Unless federal legislation were to preempt the levy, the rise of the new doctrine would make a lessee's oil production from Indian land amenable to state taxation.[29]

Had City Vending pressed the Commission with its quest to reduce the assessment to exclude exempt sales and interposed – for reduction of the levy – sales in *intratribal transactions to the ultimate consumer,* the Commission not only would have had cognizance to entertain that federal-law defense, *it would have been its duty to so do.*

C.

An Agency-Crafted Rule Should Be Adopted For Tracking And Obtaining Credit For Exempt Intratribal Cigarette Sales

The Tax Payment

Under the statutory taxing regime then (and now) in force licensed wholesalers, jobbers and warehousemen are required to pay a cigarette excise tax on *all* cigarettes that come into their possession for use of consumption in the state. 68 O.S. 1991 §§302,[30] 305(a).[31] The tax levied "shall be paid [to the Tax Commission] only once on any cigarettes sold . . . or consumed. . . . " 68 O.S. 1991 §302.[32] Payment of the excise tax is evidenced by stamps which must be affixed to the cigarette package before it is sold for further distribution. 68 O.S. 1991 §§302,[33] 305(a).[34] The licensed wholesaler's *withdrawal of the cigarettes from storage for sale or distribution marks the taxable event.*[35] 68 O.S. 1991 §305(a).[36] A cigarette tax must *be paid in advance on all cigarettes* distributed to Indian tribes. Because the taxable event occurs *before the cigarettes are either sold or distributed,* the state's collection process may easily result in an excessive payment. *The non-tribal wholesaler, when statutorily required to affix the stamps, is unable to ascertain*

in advance whether the ultimate consumer will be a tax-exempt tribal member or a nontribal purchaser.

The Tax Burden

The statutory scheme contemplates the tax incidence to be on the consumer. 68 O.S. 1991 §302.[37] If the levy is paid by anyone else, the remittance is "considered an *advance payment*" which is "added to the price of the cigarettes and recovered from the ultimate consumer or user." 68 O.S. 1991 §302.[38] The cigarette tax – initially paid by the wholesaler when stamps are bought from the Commission – is an "advance payment". The wholesaler adds the tax to the price of the cigarettes supplied to the retailer. The impact of this "pass-through" system ultimately falls upon the consumer of stamped cigarettes. In making retail sales of cigarettes the retailer is required to "show the amount of [pass-through] tax [that has been] paid as evidenced by appropriate stamps on each package of cigarettes sold" and to collect the tax "from the user or consumer". 68 O.S. 1991 §302.[39] In short, by shifting the incidence of the levy onto the ultimate consumer, the assessment regime contemplates tax reimbursement to the wholesaler and retailer. The only instance where the tax burden cannot be passed on is when unstamped cigarettes in the licensed wholesaler's possession are "lost, stolen or unaccounted for, in transit, storage or otherwise". 68 O.S. 1991 §305(f).[40] Section 305(f), which raises a resumption of use or consumption within the state, makes the wholesaler liable for taxes due on these cigarettes.

The Tax Exemption

By the then-effective statute, only two categories of sales are expressly exempted from tax – those to veteran hospitals or state-operated veteran homes and to the United States.[41] There is simply *no* provision for wholesale-level exemption for sales made to Indian tribes. Transactions with the tribes are not *per se* exempt *either by state or federal law; only cigarettes which ultimately reach the tribal consumer are exempt from the tax.* The burden of proving intratribal sales and securing for them a tax credit or refund rests on the tax remitter (the cigarette wholesaler).

A Tax Credit Or Remittitur Procedure For Reimbursement of Cigarette Taxes Paid on Intratribal Cigarette Sales

Because an excessive payment potential is clearly built into the state's *undifferentiated* cigarette tax collection approach, a fair method should be established for tracking intratribal sales and for allowing either a credit for or a remittitur of tax paid on documented intratribal sales on which excise taxes have been paid. The legislature has amended the statutory regime to provide a more orderly procedure for documenting the federal-law exemption applicable to intratribal sales.[42] Until those changes are effectuated, I would direct the Commission to adopt rules which provide (a) recordkeeping requirements that will enable a wholesaler to verify and document intratribal cigarette sales and (b) a mechanism which would allow wholesalers routinely to submit these intratribal sales records to the Commission for refund or credit.

D.

The Commission Clearly Has Cognizance To Assess A Cigarette Excise Tax Against A *Nontribal* Wholesaler Who, At The Wholesale Transaction Level, Sells Unstamped Cigarettes To Indian Tribes

Even though the cigarette tax paid by the wholesaler is a "pass-through" levy added to the price of the product sold to the retailer, this alone will not clothe a nontribal wholesaler with immunity from liability for payment on its transactions with Indian tribes. Our statutory scheme[43] for collecting cigarette excise taxes is consistent with the U.S. Supreme Court's pronouncement in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma.*[44] There, the Court, citing *City Vending of Muskogee v. Oklahoma Tax Com'n,*[45] gave its imprimatur to the state's regime of collecting cigarette excise taxes by assessing wholesalers who supply unstamped cigarettes to tribal stores. The scenario in that case is nearly identical to this. The same parties and the same type of tax assessment (a cigarette excise tax) are implicated. While the other dealt with a different issue – federal-court jurisdiction over state tax liability issues under the Bankruptcy Code[46] – the Court's reference to *City Vending* clearly denotes its renewed approval of the statutory assessment process for collecting cigarette excise taxes from wholesalers who distribute unstamped cigarettes to Indian tribes.

CONCLUSION

A party adversely affected by an agency's want of cognizance to entertain a constitutional attack must *renew*

its challenge in an appeal *directly from the agency order* to preserve its fundamental-law objections. Once an administrative order that is not facially void becomes final, it is impervious to collateral attack even on constitutional grounds.

The Commission has the authority to assess cigarette taxes against the wholesalers. The agency also has the general power to adjudicate a taxpayer's protest against the assessment, if the levy is indeed excessive because of improper inclusion of federally exempt intratribal sales. *Failure of the tax authority's order to show on its face that intratribal and nontribal sales were properly segregated or segregable and hence treated distinctly neither makes an assessment facially infirm nor unveils an absence of jurisdiction on the face of the agency proceedings.* If the Commission did include in its contested assessment some amounts attributable to intratribal sales exempted from taxation by federal law, the exercise of its *unauthorized power* was, at most, an act *in excess* of jurisdiction. In short, the contested assessment is not facially tainted *for want of cognizance.*

Because the agency's assessment is not facially void, but at most affected perhaps by an *excessive exercise of taxing power,*[47] it *is now too late* judicially to disturb the challenged order in response to the taxpayer's impermissible collateral attack.

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[1] Dow Jones & Co. v. State ex rel. Tax Com'n, Okl., 787 P.2d 843 (1990).

[2] See 68 O.S. 1991 §§302, 308(a), and 315, *infra.*

Section 302 provides in pertinent part:

> "There is hereby levied upon the sale, use, . . . possession, or consumption of cigarettes within the State of Oklahoma a tax. . . . * * * Such tax shall be evidenced by stamps which shall be furnished by and purchased from the Tax Commission or by an impression . . . by the use of a metering device when authorized by the Tax Commission . . . and said stamps or impression shall be securely affixed to one end of each package in which cigarettes are contained or from which consumed.
>
> The *impact of the tax levied* by the provisions of this article *is* hereby declared *to be on the vendee, user, consumer, or possessor* of cigarettes in this state, and, when said tax is paid by any other person, such payment shall be considered as an advance payment and shall thereafter be *added to the price* of the cigarettes and recovered from the ultimate consumer or user. * * * " (Emphasis is mine.)

The pertinent terms of §308(a) are:

> " * * * The Commission shall be responsible for the custody and sale of the stamps, and for the disposition of the proceeds thereof. * * * "

The pertinent terms of §315 are:

> *"For the purpose of enabling the Oklahoma Tax Commission to determine the tax liability* of a . . . wholesale dealer . . . , it shall have the right to inspect any premises where cigarettes are . . . stored, [or] sold . . . and to examine all of the records required herein to be kept. . . . " (Emphasis added.)

[3] *Supra* note 1.

[4] In Conoco, Inc. v. State Dept. of Health, Etc., Okl., 651 P.2d 125 (1982), the aggrieved party failed to perfect a timely appeal from a final administrative order. It then resorted to the district court for a challenge to the validity of the rule on

which the order was rested by invoking declaratory judgment jurisdiction under 75 O.S. 1981 §306. We there stated that "the time limits within which to appeal from an adverse decision are jurisdictional in nature and that if an appeal is brought untimely the court has no power to decide the case. This rule applies to judicial review of administrative actions to the same extent as it does to court judgments and decrees." *Id.* at 128.

[5] For the concept of "facial invalidity" *see infra* Part II(A).

[6] Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351-352, 20 L.Ed. 646, 651 (1872); Stump v. Sparkman, 435 U.S. 349, 356, 98 S.Ct. 1099, 1105, 55 L.Ed.2d 331 (1978).

[7] State v. Williams, 245 N.W. 663, 665 (Wis. 1932).

[8] The *manner and extent* of an adjudicative authority's exercise are but two factors which are just as appropriate for a tribunal's determination as any other issue in the proceeding. Bradley v. Fisher, *supra* note 6, 80 U.S. (13 Wall.) at 352, 20 L.Ed. at 651; State v. Williams, *supra* note 7 at 665.

The distinction between "excess" and "absence" of judicial jurisdiction is a common-law concept equally applicable to agency cognizance. If the Department of Public Safety were to press before itself, as an adjudicative agency, criminal charges for driving under the influence, the Department's authority to proceed would, without a doubt, be found entirely *wanting*. On the other hand, its authority to revoke a driver's license is statutorily present. The manner and extent of the latter power's exercise would determine whether it was *excessively* applied. Similarly here, the Tax Commission, which is vested with general authority to correct, adjust or abate an erroneous audit, was acting within its cognizance, although its assessment might be condemned as *excessive*. 68 O.S. 1991 §221(b) and (e).

[9] *See* Bradley v. Fisher, *supra* note 6, 80 U.S. (13 Wall.) at 351, 20 L.Ed. at 651.

[10] For an application to agency process of the judgment roll teaching of the common law and of the distinction between excess and absence of cognizance, *see* Gulfstream Petroleum Corp. v. Layden, Okl., 632 P.2d 376, 378 (1981), where the court extended the concept of "facial invalidity" to an administrative order of the Corporation Commission. The *Gulfstream* teaching

was followed in Kaneb Production Co. v. GHK Exploration Co., Okl., 769 P.2d 1388, 1392 (1989), and Mullins v. Ward, Okl., 712 P.2d 55, 59-60 (1985). The district court's inquiry into the validity of Corporation Commission adjudicative orders stands confined to determining, from an inspection of the face of that agency's proceedings (i.e., the application, the process by which the parties were notified and the Commission's order), if the Commission meets the jurisdictional prerequisites. *Mullins, supra* at 59 n. 7; *Gulfstream,* supra at 379.

[11] 12 O.S.1991 §1038; Hough v. Hough, Okl., 772 P.2d 920, 821 (1989); Mayhue v. Mayhue, Okl., 706 P.2d 890, 895 (1985); Scoufos v. Fuller, Okl., 280 P.2d 720, 723 (1955).

[12] Gulfstream Petroleum Corp. v. Layden, Okl., *supra* note 10 at 378; Kaneb Production Co v. GHK Exploration Co., *supra* note 10 at 1392; Mullins v. Ward, *supra* note 10 at 60.

[13] State v. Williams, *supra* note 7 at 665; People v. Ruiz, 265 Cal.Rptr. 886, 892 (Cal.App. 3 Dist. 1990).

[14] People v. Ruiz, *supra* note 13 at 892.

[15] Neither legal error nor excess of jurisdiction operates to render a judicial act facially void. Woodrow v. Ewing, Okl., 263 P.2d 167, 171 (1953). *See also* Schucker v. Rockwood, 846 F.2d 1202, 1204 (9th Cir. 1988); Robrock v. Robrock, 151 N.E.2d 234, 239 (Ohio App. 1956) (error in a ruling is not synonymous with a decision rendered either in the absence of or in excess of jurisdiction).

[16] Scoufos v. Fuller, *supra* note 11 at 721 (the court's syllabus 2); Hough v. Hough, *supra* note 11 at 921.

[17] *See* Salaney v. Ferris, 201 Okl. 236, 204 P.2d 270, 273 (1949), where the court held that a judicial act *in excess* of jurisdiction is not *facially* invalid. This principle has been consistently followed in other cases. *See, e.g.,* Taylor v. Dale, 201 Okl. 519, 207 P.2d 789, 789-790 (1949); Allison v. Howell, 204 Okl. 404, 230 P.2d 706, 709 (1951); State ex rel. Hunt v. Green, Okl., 508 P.2d 639, 642 (1973).

[18] *See* authorities cited *supra* note 10.

[19] Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820, 110 S.Ct. 1566, 1568, 108 L.Ed.2d 834 (1990); Tafflin v. Levitt, 493 U.S. 455, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990); Gulf

Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981); *see also* McLin v. Trimble, Okl., 795 P.2d 1035, 1045 (1990) (Opala, V.C.J., dissenting).

[20] 489 U.S. 838, 109 S.Ct. 1519, 1521, 103 L.Ed.2d 924 (1989).

[21] 498 U.S. ___, 111 S.Ct. 905, 912, 112 L.Ed.2d 1112 (1991).

[22] Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, *supra* note 21, 498 U.S. at ___, 111 S.Ct. at 912.

[23] State ex rel. May v. Seneca-Cayuga Tribe, Okl., 711 P.2d 77, 92 (1985).

[24] Absent express congressional authorization, a state cannot tax the United States directly. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 175, 109 S.Ct. 1698, 1707, 104 L.Ed.2d 209 (1989). Federal immunity from state taxation is based on the Supremacy Clause of the United States Constitution, Art. 6, cl. 2, U.S. Const. *See* South Carolina v. Baker, 485 U.S. 505, 518, 108 S.Ct. 1355, 1364 n. 11, 99 L.Ed.2d 592 (1988); Massachusetts v. United States, 435 U.S. 444, 455, 98 S.Ct. 1153, 1161, 55 L.Ed.2d 403 (1978).

[25] Cotton Petroleum Corp. v. New Mexico, *supra* note 24, 490 U.S. at ___, 109 S.Ct. at 1707; Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764, 105 S.Ct. 2399, 2402, 85 L.Ed.2d 753 (1985).

[26] Cotton Petroleum Corp. v. New Mexico, *supra* note 24, 490 U.S. at ___, 109 S.Ct. at 1707.

[27] The intergovernmental tax immunity rule was based on the rationale that any tax on income a party received under a government contract was a tax on the contract and thus a tax "on" the government because it burdened the government's power to enter into the contract. South Carolina v. Baker, *supra* note 24, 485 U.S. at 518, 108 S.Ct. at 1363-1364; Cotton Petroleum Corp. v. New Mexico, *supra* note 24, 490 U.S. at ___, 109 S.Ct. at 1706-1707. The doctrine of intergovernmental tax immunity reached its zenith in Gillespie v. Oklahoma, 257 U.S. 501, 42 S.Ct. 171, 66 L.Ed. 338 (1922), where the Court applied it to invalidate a state tax on income derived by a non-Indian lessee from the sale of his interest in oil produced on Indian

land. In *Cotton* the Court observed that after *Gillespie* the doctrine "started a long path in decline and has now been 'thoroughly repudiated' by modern case law." Cotton Petroleum Corp. v. New Mexico, *supra* note 24, 490 U.S. at ___, 109 S.Ct. at 1706; South Carolina v. Baker, *supra* note 24, 485 U.S. at 519-520, 108 S.Ct. at 1365.

[28] Cotton Petroleum Corp. v. New Mexico, *supra* note 24, 490 U.S. at ___, 109 S.Ct. at 1707 (emphasis mine); South Carolina v. Baker, *supra* note 24, 485 U.S. at 520-523, 108 S.Ct. at 1365-1367.

[29] Cotton Petroleum Corp. v. New Mexico, *supra* note 24, 490 U.S. at ___, 109 S.Ct. at 1707; South Carolina v. Baker, *supra* note 24, 485 U.S. at 518, 108 S.Ct. at 1364-1366. After *Gillespie*, *supra* note 27, was squarely overruled in Helvering v. Mountain Producers Corp., 303 U.S. 376, 386-387, 58 S.Ct. 623, 627-628, 82 L.Ed. 907 (1938), "oil and gas lessees operating on Indian reservations were subject to nondiscriminatory state taxation as long as *Congress did not act affirmatively to pre-empt the state taxes.*" Cotton Petroleum Corp. v. New Mexico, supra note 24, 490 U.S. at ___, 109 S.Ct. at 1706 (emphasis added). See also Apache Gas Products Corp. v. Oklahoma Tax Com'n, Okl., 509 P.2d 109, 114-115 (1973).

[30] For the pertinent text of 68 O.S.1991 §302, *see supra* note 2.

[31] The terms of 68 O.S.1991 §305(a) provide in pertinent part:

> "Every wholesaler . . . doing business within this State and required to secure a license . . . shall, *upon withdrawal from storage, and before making any sale or distribution for consumption thereof,* cause the same to have affixed thereto the stamp or stamps as required by this Article. . . . " (Emphasis mine.)

[32] For the pertinent text of 68 O.S. 1991 §302, *see supra* note 2.

[33] For the pertinent text of 68 O.S. 1991 §302, *see supra* note 2.

[34] For the pertinent text of 68 O.S. 1991 §305(a), *see supra* note 31.

[35] Section 305(c) provides that any consumer may purchase unstamped cigarettes directly from the wholesaler if, prior to the purchase, he secures a written license from the Tax Commission and posts a surety bond. After purchase, he must immediately buy stamps from the Commission and affix them to the cigarettes. In that instance, the taxable event occurs when the stamps are affixed to the cigarette packages.

[36] For the pertinent text of 68 O.S.1991 §305(a), *see supra* note 31.

[37] For the pertinent text of 68 O.S.1991 §302, *see supra* note 2.

[38] For the pertinent text of 68 O.S.1991 §302, *see supra* note 2, (emphasis mine).

[39] For the pertinent text of 68 O.S.1991 §302, *see supra* note 2, (emphasis mine).

[40] The terms of 68 O.S.1991 §305(f) are:

> "(f) Any person, including distributing agents, wholesalers, jobbers, carriers, warehousemen, retailers and consumers, having possession of unstamped cigarettes in this State shall be liable for the tax on such cigarettes in case the same are lost, stolen or unaccounted for, in transit, storage or otherwise, and in such event a presumption shall exist for the purposes of taxation, that such cigarettes were used and consumed in Oklahoma."

[41] The terms of 68 O.S.1991 §321 are:

> "All cigarettes sold to veterans hospitals and state operated domiciliary homes for veterans located in the State of Oklahoma, for distribution or sale to disabled ex-servicemen or disabled ex-servicewomen interned in, or inmates of, such hospitals, or residents of such homes, and all sales to the United States are hereby exempted from the stamp excise tax levied by this Article."

Section 321's amendment in 1992 (Okl.Sess.L., Ch. ___ §16, eff. Jan. 1, 1993) adds two additional exempted categories; the statute now provides:

"The following sales are hereby exempted from the stamp excise tax levied pursuant to the provisions of Section 301 et seq. of this title:

"1. All cigarettes sold to veterans hospitals and state operated domiciliary homes for veterans located in the State of Oklahoma, for distribution or sale to disabled ex-servicemen or disabled ex-servicewomen interned in, or inmates of, such hospitals, or residents of such homes;

2. All sales to the United States;

3. All sales to a federally recognized Indian tribe or nation which has entered into a compact with the State of Oklahoma pursuant to the provisions of subsection C of Section 1 of this act or to a licensee of such a tribe or nation, upon which the payment in lieu of taxes required by the compact has been paid; and

4. All sales to a federally recognized Indian tribe or nation or to a licensee of such a tribe or nation upon which the tax levied pursuant to the provisions of Section 4 of this act has been paid."

The 1992 amendment does not affect my analysis in this writing.

[42] The *new statutory regime* is effective January 1, 1993. 68 O.S.Supp.1992 §§301, 309, 321, 346-352, 401, 403.1, 413, 419, 424-429, 1355. Indian tribes who have entered into tax compact with the State will be treated differently from those that have not. As to the latter category, licensed wholesalers will continue to purchase the cigarette tax stamp, affix it to the cigarette packages and pass the tax onto the Indian tribe and ultimately to the consumer. 68 O.S.Supp.1992 §350. The Indian tribe may then receive a refund from the Commission for documented sales to its tribal members. 68 O.S.Supp.1992 §426(b).

[43] *See supra* Part II(C) for a discussion of the statutory taxing scheme.

[44] Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, supra note 21, 498 U.S. at ___, 111 S.Ct. at 912.

[45] 898 F.2d 122 (10th Cir. 1990).

[46] 11 U.S.C. 505.

[47] Gulfstream Petroleum Corp. v. Layden, *supra* note 10 at 378; Kaneb Production Co. v. GHK Exploration Co., *supra* note 10 at 1392; Mullins v. Ward, supra note 10 at 60. Because the common law's facial invalidity limits now govern an agency's exercise of adjudicative process, *I would today, as I believe we must, hold that the distinction between excess and absence of jurisdiction* protects administrative orders from impermissible collateral attacks with the very same force as it does judgments and orders of courts.

ALMA WILSON, J., (concurring specially) I write specially to emphasize the need for the Oklahoma Tax Commission to adopt agency rules for approving cigarette tax credits or refunds based upon claimed exemptions. It is now established that sales of cigarettes by a retailer clothed with the exemption of a federally registered Indian tribe to a member of a federally registered Indian tribe are exempt from the cigarette tax burden. For ease in administration, our cigarette tax scheme requires the wholesalers of cigarettes to pay the cigarette tax to the Commission and then collect the tax from their buyers. This statutory scheme should be administered to preserve the established exemptions. That is, the Commission should provide the cigarette wholesalers with a credit or refund procedure when the tax has been paid on cigarettes sold by a retail "Indian smoke shop" to the ultimate consumer who is a member of a federally registered Indian tribe.

The assessment of cigarette tax, penalties and interest, in this case, is not subject to adjustment to allow credit or refund based on the Indian exemption because of its technical finality. 68 O.S. 1981, § 221. However, field audit and assessment should not be the first avenue available for the cigarette wholesalers to claim a credit or refund of tax paid on cigarettes exempted from the tax. The Commission should promulgate rules which adequately detail the method by which cigarette wholesaler may claim a credit or refund of taxes paid and the evidence necessary to prove the claim.

KAUGER, J., (dissenting) City Bending of Muskogee, Inc. (City Vending) argues that the Oklahoma Tax Commission's ruling was void for lack of jurisdiction, and that

the unstamped cigarettes sold to Indian Tribes were exempted by virtue of the Commerce Clause of the United States Constitution.[1] *The United States Supreme Court in Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* ___ U.S. ___, 111 S.Ct. 905, 908, 912 L.Ed. 2d 1112, 1118, 1123 (1991), did not address the Commerce Clause; however, it held that under the doctrine of tribal sovereign immunity, the State cannot tax the sale of cigarettes to Indians. It also found that the State can collect taxes on sales to nontribal members.[2]

In *Potawatomi,* the United States Supreme Court offered the Tax Commission suggested alternatives it might pursue to collect the tax from nontribal members. The Court, while recognizing that the most reliable solution was Congressional action, suggested that states might collect sales tax from cigarette wholesalers. The majority opinion is bottomed on the Supreme Court's solution. This might be appropriate relief – had the Oklahoma Legislature so provided. Here, the majority is not writing upon a clean slate. It has, by judicial fiat, amended § 302 apparently because the United States Supreme Court "in an effort to be helpful" offered some gratuitous advice unrelated to the reality of the Oklahoma statutes.

Because the majority had held that we need not address state jurisdiction to tax tribal members, this case turns not on cigarettes, tribal immunity, jurisdiction, or tax stamps; rather, it is a matter of statutory construction. The majority has refused to apply the statutes as written and has decided sua sponte to amend the controlling statute to add the wholesaler to the taxation chain. The Oklahoma statute, 68 O.S. 1991 § 302 provides that:

> " . . . The impact of the tax levied by the provisions of this article is hereby declared to be on the vendee, user, consumer, or possessor of cigarettes in this state, and, when said tax is paid by any other person, such payment shall be considered as an advance payment and shall thereafter be added to the price of the cigarettes and recovered from the ultimate consumer or user . . . . Every *retailer* who makes sales of cigarettes within this state to persons for use or consumption shall separately show the amount of tax paid as evidence by appropriate stamps on each package of cigarettes sold, and the tax shall be collected by the retailer from the user or consumer. . . . "

Although the majority opinion fails to mention § 302, it has rewritten it in order to shift the responsibility for payment of cigarette taxes for all the unstamped cigarettes sold to Indian Tribes to the cigarette wholesaler. Instead, with certain exceptions, the majority finds that under 68 O.S. 1991 § 304 and § 305 the wholesaler is responsible for buying and affixing the tax stamps to all cigarettes it sells.[3] Without further statutory analysis of § 302, § 304, § 305, or 68 O.S. 1991 1356,[4] the majority finds that the wholesaler is responsible for the sales tax because the wholesaler failed to show either any statutory exemption or to identify the Indian tribe's ultimate consumer.

The only exception to the duty to pay taxes by the wholesaler allowed by the majority opinion occurs if the wholesaler can establish an exemption under 68 O.S. 1991 § 310 and § 321.[5] Indian tribes are not specifically included within either of these statutory exemptions. However, sales to the United States are.

The sales in question were made to three Indian tribes. One of the tribes, the Citizen Band Potawatomi, furnished the wholesaler with a copy of a letter from the Oklahoma Tax Commission which stated:

> "In reply to your letter of April 26, 1978, please be advised we recognize the Citizen Band Potawatomi Indians of Oklahoma as being exempt from sales tax on your purchases of tangible personal property under the provisions found in Paragraph (i), Section 1305, Article 13, Title 68, O.S. 1971."[6]

Title 68 O.S. 1971 § 1305(i) provided that sales to the United States Government, the State, or any of its political subdivisions were exempt from sales tax.[7] Section 1305 has been repealed. Nevertheless, the same exemption is now found in 68 O.S. 1991 § 1356.[8] It provides exemptions to the United States government, the state of Oklahoma, its political subdivisions or agencies of those subdivisions. Because the tribe is not an arm of the state, its exemption must be on a footing with the only other sovereign nation listed – the United States.

Section 321 provides that all sales to the United States are exempt from the cigarette stamp excise tax. Because the Tax Commission interpreted United States within the meaning of § 1356 to include Indian Tribes as sovereign nations for the purposes of sales tax exemption, the exemption statute extends to Indian Tribes. The Commission, by continually interpreting "United States" to include Indian Tribes in § 1305 and now § 1356, has imparted to this term the character of a term of art. This is particularly evident because it is used in the same statutory setting with the sales tax exemption statute.[9]

The long-standing construction given to a statutory provisions is given great weight. It cannot be undone by the Commission – Legislative amendment is required to change the long-standing construction.[10]

The concurring in judgment opinion relying principally on § 305 reaches the same result by finding that the wholesaler's withdrawal of the cigarettes with affixed stamps from storage for sale or distribution marks the taxable event. According to this scenario, the removal from storage mandates that the wholesaler collect the tax from the retailer. However, neither § 302 nor § 305 support this position. Section 302 specifically provides that the retailer *shall* collect the tax from the user or consumer. Under § 305, several parties are responsible either for affixing stamps or paying the stamp tax: 1) the wholesaler is required to affix stamps when the cigarettes are removed from storage and is only liable for taxes when the cigarettes are lost, unaccounted for or stolen; 2) a retailer can be responsible for affixing stamps to cigarettes if the cigarettes are purchased from an out-of-state wholesaler who is not required to stamp the cigarettes under Oklahoma law; and 3) an unlicensed consumer is required to pay the stamp tax if it purchases unstamped cigarettes from the wholesaler.

The view expressed by the concurring in judgment opinion is internally inconsistent with §305 because: 1) an out-of-state wholesaler who removed the cigarettes from storage is neither required to stamp the cigarettes nor charge the retailer for the stamp tax because the retailer becomes responsible for affixing the stamps; and 2) the statute specifically states that the unlicensed consumers are responsible for the taxes on unstamped cigarettes.

Had the legislature viewed the taxable event as the moment the cigarettes were removed from storage it would be unnecessary to include provisions for the out-of-state wholesalers – tax stamps would have been required. Even more obvious is that under §305 the unlicensed consumer pays the stamp tax directly to the Oklahoma Tax Commission. If the taxable event were the removal from storage logic would assume that the wholesaler would be required to collect the tax from the unlicensed consumer.

The goal of statutory construction is to determine the intent of the legislature through the language used.[11] Under §305(f), the wholesaler is responsible for cigarette taxes only if the unstamped cigarettes are lost, stolen or unaccounted for in transit, storage or otherwise. The cigarettes in question were not lost or stolen. The issue is whether the cigarettes were "accounted for" by the wholesaler. The Superior Court of Connecticut in *Allied Grocers Co-op, Inc. v. Tax Comm'r,* 36 Conn.Supp.59,411 A.2d 313-14 (1979), interpreted a similar statutory provision. The Court using the natural and usual meaning of the word *"unaccounted"* determined that it meant that the distributor would not be able to tell where the cigarettes went for ultimate sale to the consumer. This interpretation is supported by the Committee Comments which accompanied the enactment of subsection (f) of §305. The Legislature provided in the Comments that the new subsection raised a presumption of consumption within the state and placed the burden on the last person who had the incidents of ownership or possession of the unaccounted-for cigarettes.[12] Under the plain and clear meaning of the statute accompanied by the committee

comment discussing subsection (f), it is evident that the Legislature did not intend for the wholesaler to be responsible for cigarettes which are not stolen or lost. City Vending can account for the cigarettes. All were sold to Indian tribes. Here, the last parties having incidents of ownership were the Indian tribes, not City Vending.

Statutes must be construed as a consistent whole in harmony with logic, and every portion or part of the statute should be given effect if possible.[13] We presume that the Legislature does not act in vain.[14] The Legislature stated explicitly in 68 O.S. 1991 §302, that the retailer shall collect the tax from the user or consumer.[15] Under our statutory scheme, the ultimate burden of tax collecting is upon the retailer – not the wholesaler. If the legislative intent were for the wholesaler to collect the tax, the wholesaler would be included in the text of §302 and it would not explicitly require the retailer to collect the tax. Section 305(f) would not provide an exemption for accounted-for sales. Under this analysis, the wholesaler is not responsible for taxes when it can account for the cigarettes.

Under the majority's opinion, the wholesaler is required to know an Indian tribes' ultimate consumer – Indian or non-Indian – and pay taxes accordingly. There is no provision in the statutes which requires the wholesaler to ascertain the identity of the retailer's ultimate consumer. Assuming arguendo, that this result could be accomplished, it would require a statutory amendment by the Legislature – not by this Court – to reach this result. In fact, the Legislature has enacted legislation, which was signed by the Governor on May 28, 1992, on this very issue. It amends the Act to allow tribes to enter

into tax compact agreements with the State and to provide for the wholesaler to be responsible for the cigarette tax on cigarettes sold to tribally owned or licensed stores which are not included in a compact agreement.[16]

The circumlocutionary reasoning in the concurring in judgment opinion will not stand when the new Act is read with the previous statutes. The concurring in judgment acknowledges the new Act; however, it fails to understand the significance of Section 11 of the new act – the provision which places the cigarette tax responsibility on the wholesaler – which would not be necessary if the State could already collect the cigarette tax from the wholesaler. I must dissent from the majority opinion because 68 O.S. 1991 §302 does not place the burden of taxation upon the wholesaler when the cigarettes can be traced to an identifiable purchaser exempt from taxation.

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[1] United States Const. art. I, §8, cl. 3 provides:

> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

[2] This accords with the recent decision by the 10th Circuit Court of Appeals, *Sac and Fox Nation v. Oklahoma Tax Comm.*, Nos. 91-6236 & 91-6237, 1992 U.S. App. Lexis 13604 (10th Cir. June [illegible] 1992).

[3] 68 O.S. 1991 §304 provides in pertinent part:

> "Every manufacturer, wholesaler, warehouseman, jobbers or distributor of cigarettes in this state, as a condition of carrying on such business, shall annually secure from the Tax Commission a written license, . . . "

Title 68 O.S. 1991 §305 provides in pertinent part:

> " . . . (b) Every retailer who has received cigarettes from a manufacturer, wholesaler, . . . not required to secure a license as provided for under Section 304 of this Code, or to affix stamps as required under the preceding paragraph, shall, . . . affix stamps upon all cigarette packages . . .
>
> (c) Any unlicensed consumer who buys direct from any distributor, jobber, manufacturer, warehouseman, or wholesaler, . . . any cigarettes in excess of forty (40), at any one time to which are not affixed the stamps required by this Article shall, . . . secure from the Tax Commission a written license . . . and shall post with the Commission a surety bond . . . conditioned that he will comply with the rules and regulations of the Tax Commission and pay all taxes and penalties and affix to all such cigarettes the proper tax stamps as provided by law, . . .
>
> (f) any person, including distributing agents, wholesalers, jobbers, carriers, warehousemen, retailers and consumers, having possession of unstamped cigarettes in this State shall be liable for the tax on such cigarettes in case the same are lost, stolen or unaccounted for, in transit, storage or otherwise, and in such event a presumption shall exist for the purposes of taxation, that such cigarettes were used and consumed in Oklahoma."

[4] Title 68 O.S. 1991 §1356 provides in pertinent part:

" . . . There are hereby specifically exempted from the tax levied by this article:

> (A) Sale of tangible personal property or services to the United States government or to the State of Oklahoma, any political subdivision of this state, or any agency of a political subdivision of this state, . . . "

[5] Title 68 O.S. 1991 §310 provides in pertinent part:

"(a) Any person who sells cigarettes in interstate commerce shall, after filing proper bond with the Tax

> Commission, be excused from affixing stamps to the cigarettes he sells and ships to a person in some other state. . . . "

Title 68 O.S. 1991 §321 provides:

> "All cigarettes sold to veterans hospitals and state operated domiciliary homes for veterans located in the State of Oklahoma, for distribution or sale to disabled ex-servicemen or disabled ex-servicewomen interned in, or inmates of, such hospitals, or residents of such homes, and all sales to the United States are hereby exempted from the stamp excise tax levied by this article."

[6] Exhibit A of the Brief of the Appellant dated March 31, 1986.

[7] Title 68 O.S. Supp. 1971 §1305(i) provides in pertinent part:

> "(i) Sales to the United States government, State of Oklahoma, or any of its political subdivisions."

[8] Title 68 O.S. 1991 §1356 see note 4, supra.

[9] *Atchison, Topeka and Santa Fe Ry. v. United States,* 209 Supp. 35, 42 (N.D. Ill. 1962).

[10] *Oral Roberts Univ. v. Oklahoma Tax Comm'n.,* 714 P.2d 1013, 1016 (Okla. 1985).

[11] *State ex rel. Macy v. Freeman,* 814 P.2d 147, 153 (Okla. 1991); *Ledbetter v. Oklahoma Alcoholic Beverage Laws Enforcement Comm'n,* 764 P.2d 172, 179 (Okla. 1988).

[12] Title 68 O.S. Supp. 1965 §305, Committee Comments, provides:

> "Subsection (f) is new. It raises a presumption of use or consumption within this State of cigarettes lost, stolen or unaccounted for, placing the liability for taxes on such cigarettes upon the person who had the incidents of ownership or possession of the cigarettes at the time lost, stolen or unaccounted for."

[13] *Cowart v. Piper Aircraft Corp.,* 665 P.2d 315, 317 (Okla. 1983).

[14] *Cooper v. Dix*, 771 P.2d 614, 617 (Okla. 1989).

[15] Title 68 O.S. 1991 §302 provides in pertinent part:

" . . . Every retailer who makes sales of cigarettes within this state to persons for use or consumption shall separately sow the amount of tax paid as evidenced by appropriate stamps on each package of cigarettes sold, and the tax shall be collected by the retailer from the user or consumer. The provisions of this section shall in no way affect the method of collection of such tax on cigarettes as now provided for by existing law. . . . "

[16] Senate Bill 759 (1992) provides in pertinent part:

"SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 346 of Title 68, . . .

A. The legislature finds that:

1. Federal law recognizes the right of Indian tribes and nations to engage in sales of cigarettes and tobacco products to their members free of state taxation;

2. The doctrine of tribal sovereign immunity prohibits the State of Oklahoma from bringing a lawsuit against an Indian tribe or nation to compel the tribe or nation to collect state taxes on sales made in Indian country to either members or nonmembers of the tribe or nation without a waiver of immunity by the tribe or nation or congressional abrogation of the doctrine; and

3. The Supreme Court of the United States in 'Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma', suggested that a state may provide other methods of collection of state taxes on sales of cigarettes and tobacco products made by Indian tribes or nations to persons who are not members of the tribe or nation, such as entering into mutually satisfactory agreements with Indian tribes or nations. . . .

"C. The Governor is authorized by this enactment to enter into cigarette and tobacco products tax compacts on behalf of the State of Oklahoma with the federally recognized Indian tribes or nations of this state. . . . All sales in Indian country by those compacting tribes or nations and their licenses shall be exempt from the taxes levied pursuant to the provisions of Section 301 et seq., Section 401 et. seq. and Section 1350 et seq. of Title 68 of the Oklahoma Statutes and Sections 4 and 9 of this act, . . .

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma States as Section 424 of Title 68, . . .

The provisions of Sections 9 through 12 of this act shall not apply to a federally recognized Indian tribe or nation which has entered into a compact with the State of Oklahoma pursuant to the provisions of subsection C of Section 1 of this act or to a licensee of such a tribe or nation during the period that such compact is effective. . . .

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 427 of Title 68 . . .

Every wholesaler, jobber or warehouseman doing business within this state and required to secure a license as provided in Section 415 of Title 68 of the Oklahoma Statutes may sell tobacco products to tribally owned or licensed stores in this state. It shall be the duty of the wholesaler, jobber or warehouseman to collect, report and remit the tax imposed by Section 10 of this act on the tobacco products inventory sold to a tribally owned or licensed store. . . . "

SUMMERS, J., (with whom Kauger, J. joins, dissenting) In its final footnote the majority states that we need not determine if the OTC's order is subject to a jurisdictional collateral attack, because no evidence was presented by City Vending to show that sales were made to Indians and Indian tribes. I must disagree. The order of the OTC stated that it was *not disputed* that City Vending sold cigarettes to Indians and/or Indian tribes. This being the case, we are directly confronted with a collateral attack on the jurisdiction of the OTC to tax those sales made to Indians or Indian tribes.

The Federal Constitution, as interpreted in *Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Comm'n*, 111 S.Ct. 905 (1991), forbids a state from taxing the sale of cigarettes made by a tribal smokeshop to a tribal member. Although the OTC is given, by statute, the jurisdiction over collection of taxes, this statutory grant of jurisdiction cannot exceed that which is allowed by the Federal Constitution.

As such, the collateral attack of the OTC's order by City Vending presents a question of federal constitutional jurisdiction and should be addressed by this Court. The OTC lacks jurisdiction to tax the sales of tribal smokeshops to tribal members. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134-157 (1980). The OTC did not exempt these sales from taxation in its order, but instead lumped the two categories of sales – those to tribal member and those to nontribal members – into one category and assessed a tax on the entire amount of sales. Because the OTC acted beyond that jurisdiction

permitted by the Commerce Clause of the Federal Constitution, its Order is facially void. *See Scoufos v. Fuller,* 280 P.2d 720, 723 (Okla. 1955).

SUPREME COURT OF OKLAHOMA

OKLAHOMA TAX COMMISSION, Appellee,
v. CITY VENDING OF MUSKOGEE, INC.,
Appellant.

No. 65,602. April 23, 1991

Certiorari to the Court of Appeals,
Oklahoma City Division, Hon. William Bliss

Wholesaler of cigarettes appeals from Order of District Court permanently enjoining it from selling cigarettes to Indian tribes for resale without collecting sales tax, and seeks to collaterally attack earlier order of Tax Commission assessing the sales tax against wholesaler. Court of Appeals affirmed. *Held:* State has no jurisdiction to collect sales tax on tribal sales of cigarettes to tribal members. Oklahoma Tax Commission failed to recognize this in its order assessing tax, and order of Tax Commission was therefore void *ab initio.* Tax Commission's order is subject to collateral attack on timely appeal from the Judgment of the District Court.

CERTIORARI PREVIOUSLY GRANTED, COA OPINION VACATED, ORDER VACATED, JUDGMENT OF LOWER COURT REVERSED, AND CAUSE REMANDED

J. Lawrence Blankenship, General Counsel, Robert C. Jenkins, Oklahoma City, attorneys for appellee.

Jon Tom Staton, Muskogee, attorney for appellant.

SUMMERS, J., City Vending is a tobacco wholesaler[1] who engages in business with various Indian tribes. City Vending sells to the tribes cigarettes, which are then in turn sold by the tribes in their retail outlets, or "smokeshops." An example of a tribe to which City Vending sells such cigarettes is the Citizen Band Potawatomie Indians,

which had been recognized as being exempt from sales tax by the Oklahoma Tax Commission.[2] City Vending did not purchase tax stamps for the cigarettes sold to the tribes, claiming that such cigarettes were exempt from taxation under the Indian Commerce Clause. Under 68 O.S. 1981 § 305, the wholesaler is required to purchase tax stamps and affix them to the cigarettes before they are sold, except in instances specified in 68 O.S. 1981 §§ 310 and 321.

On May 31, 1985, the Oklahoma Tax Commission audited City Vending, challenged its claimed exemption, and assessed taxes based on its failure to buy cigarette stamps. The Commission then notified City Vending of its intent to revoke its wholesale license pursuant to 68 O.S. 1981 §§ 304 and 324 for failure to pay taxes and interest in the amount of $83,794.45. City Vending asked for a hearing, and in the documents filed before the Commission, argued that the sale of cigarettes to Indian tribes was exempt from taxation under the Indian Commerce Clause. On July 24, 1985, the Commission held a hearing wherein the administrative law judge expressly determined that he did not have the authority to decide constitutional questions. Nevertheless, the judge, without regard to the Indian Commerce Clause question, held that the taxes could be collected and City Vending's license could be revoked pursuant to 68 O.S. 1981 § 306 and 321. The judge reasoned that Sections 305 and 306 required that tax stamps be affixed to the cigarettes because there was no "Indian tribe" exemption expressly stated elsewhere in the statutes. The Tax Commission adopted the findings and opinion of the administrative law judge, and City Vending's wholesale license was instantly revoked.

City Vending paid the assessment under protest but continued the practice of selling cigarettes without the affixed tax stamp, and without a license. On October 30, 1985, the Tax Commission filed an action in the Muskogee County District Court, asking for permanent injunctive relief to prohibit such practice. City Vending answered and cross-claimed against the Commission, again raising the constitutional issue. The Muskogee County District Court granted the Commission's prayer and entered a permanent injunction on November 27, 1985. (The present appeal is from this action.)

On November 20, 1985, City Vending filed suit in Federal District Court, again raising the Indian Commerce Clause question. The Commission asked that the suit be dismissed, arguing that the time limitations of 68 O.S.1981 §§225 and 226 foreclosed an appeal. The Federal Court dismissed the action, agreeing that no appeal from the order of the Tax Commission was timely filed.

City Vending then filed an action in Oklahoma County District Court, urging that the taxation by the Commission was unconstitutional and that the taxes paid under protest be refunded. Again, the Commission urged that the appeal was not timely and should be dismissed. On this occasion, the Oklahoma County District Court disagreed, finding that the Commission's order was void *ab initio* for lack of jurisdiction. The Commission then sought a writ of prohibition from this Court, asking that the district court be prohibited from proceeding in the action. This Court assumed jurisdiction and granted the writ on March 17, 1986.

City Vending now timely appeals from the November 27, 1985 ruling of the Muskogee County District Court enjoining City Vending from selling cigarettes and revoking their license. Once again it urges the unconstitutionality of the order assessing taxes. In an unpublished opinion, the Court of Appeals upheld the trial court's ruling on the basis that the appeal from the Tax Commission's order was not timely filed.[3] Thus far, no court has yet considered the merits of City Vending's constitutional argument. On March 2, 1990, this Court granted certiorari. We reverse the ruling of the Muskogee County District Court and vacate the Court of Appeals' opinion.

I. JURISDICTION OF THE COMMISSION

The Commission urges that City Vending is precluded from relief because it failed to timely appeal the tax assessment under 68 O.S. 1981 § 226.[4] This failure was the basis of the District Court's injunction, the Federal Court's dismissal, and this Court's writ of prohibition. City Vending, on the other hand, urges that the tax assessment and subsequent order of the Commission were void *ab initio* because the Commission lacked subject matter jurisdiction to assess the tax with the *jurisdictional constitutional* question unresolved. Both parties agree that the appeal of the tax assessment was untimely under 68 O.S. 1981 § 226. The Commission urges that it had subject matter jurisdiction which was conferred by the general statutes allowing taxation of the sale of cigarettes. *See* 68 O.S. 1981 §§ 301-325. In the alternative, the Commission argues that Section 226 was the *only* remedy available to City Vending, even if the order was jurisdictionally defective.

Generally, a party who fails to perfect a timely appeal from a final order of an administrative agency, or who fails to exhaust administrative remedies, may not later challenge the ruling. *See Conoco v. State Dept. of Health,* 651 P.2d 125, 128 (Okla. 1982); *Martin v. Harrah Indep. School Dist.,* 543 P.2d 1370, 1372 (Okla. 1976). However, this general rule does not bar an appeal if the agency acted beyond its authority. "If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities." *Vallely v. Northern Fire & Marine Ins. Co.,* 254 U.S. 348, 353 (1920); *see also Tenneco Oil Co. v. El Paso Natural Gas,* 687 P.2d 1049, 1052 (Okla. 1984). Furthermore, the prohibition against collateral attack of an order such as this one does *not* prevent inquiry into the jurisdiction of the tribunal where the questioned order is relied upon in a subsequent proceeding. *See Kaneb Production Co. v. GHK Exploration Co.,* 769 P.2d 1388, 1391-91 Okla. 1989); *State v. Corp. Comm'n.,* 590 P.2d 674, 677 (Okla. 1979); *Mayfield v. French Truck Serv., Inc.,* 369 P.2d 461, 463 (Okla. 1961). In fact, as we stated in Tenneco, "the Supreme Court of Oklahoma must inquire into its own jurisdiction *as well as the jurisdiction* of the trial court, whether or not raised by a party." *Tenneco,* 687 P.d at 1052.

Thus, our first question is whether the Commission had jurisdiction to issue the order. Because the parties failed to timely appeal, the order may not be attacked at this time if it is jurisdictionally sound. Only if the order was void *ab initio* for lack of jurisdiction may a collateral attack now be successful against it. *Farmers' Union Co-op Royalty Co. v. Woodward,* 515 P.2d 1381, 1384 (Okla. 1973).

See Scoufos v. Fuller, 280 P.2d 720, 723 (Okla. 1955); 12 O.S. 1981 § 1038.

Further, if the Commission's order is jurisdictionally defective, it does not "operate as res judicata or estoppel on the parties in another court." *Landy v. First Nat'l Bank & Trust Co.,* 368 P.2d 987, 990 (Okla. 1962). In order for a judgment to operate as a conclusive determination of the controversy, the court rendering judgment must have jurisdiction over the parties and subject matter. The Commission's order will not estop City Vending from collaterally challenging the ruling if the Commission lacked subject matter jurisdiction.

In order for a judgment to be void, the fatal jurisdictional defect must appear on the face of the proceedings. *Harry R. Carlile Trust v. Cotton Petroleum,* 732 P.2d 438, 441 (Okla. 1986). In *Scoufos v. Fuller,* 280 P.2d at 723, we stated the familiar rule that for a judgment to be void, it must appear on its face that the court rendering judgment lacked (1) jurisdiction over the parties, (2) jurisdiction over the subject matter, or (3) jurisdictional power to render the particular judgment. *See also Gulfstream Petroleum Corp. v. Layden,* 632 P.2d 376, 378 (Okla. 1981); *State v. Corp. Comm'n,* 590 P.2d 674, 678 (Okla. 1979); *Abraham v. Homer,* 102 Okl. 12, 226 P.45 (1924).

As for the requirement that the defect appear on the face of the proceedings, this Court has stated that inquiry is limited to an "inspection of the proceedings:" *Carlile,* 732 P.2d at 441. *See also Kaneb,* 769 P.2d at 1392. In order for a judgment to be held void on the face of the record, or judgment roll, extrinsic evidence is not admissible, nor may it be considered in determining the judgment's

invalidity. *Scoufos v. Fuller,* 280 P.2d at 723. For example, in *Carlile,* we were called upon to decide whether an order of the Corporation Commission could be collaterally attacked on the grounds of voidness for lack of personal jurisdiction. Acknowledging that a collateral attack may not be launched against an order which is "facially invulnerable," we proceeded to address the jurisdictional question by reviewing the applicable law with regard to notice by publication. Hence, it becomes clear that a review of the applicable law is permissible to determine whether an order is facially defective.

In its order, the Tax Commission recognized that City Vending's argument against the tax assessment rested on constitutional grounds:

> Protestant contends that the sale of the cigarettes to Indian tribes for resale . . . is exempt under the interstate commerce clause of the United States Constitution. . . . (See Article I, Section 8, Clause 3 of the Constitution of the United States of America). . . . (order of Tax Commission P.3)

The Commission continued by holding that the "Oklahoma Tax Commission has jurisdiction in this matter." In the following sentence the administrative law judge stated that the Commission did not have "jurisdiction to determine the constitutional questions presented and asserted by the Protestant [City Vending]." O.R. 9 the administrative law judge then proceeded to uphold the assessment, ruling that the general taxation statutes gave the Commission the authority to tax City Vending notwithstanding the constitutional challenge.

Clearly, the issue in question in the present case is that of subject matter jurisdiction. Subject matter jurisdiction has been described as requiring the presence of "facts showing that the matter involved in a suit constitute a subject matter consigned by law to the jurisdiction of that court." *State v. Corp. Comm'n*, 590 P.2d at 678; *Abraham v. Homer*, 226 P. at 45. Here, the subject matter in controversy at the Tax Commission between the parties was the constitutionality of the tax assessed by the Commission. City Vending did not question the Commission's position as to the statutes nor its liability under the simple wording thereof; rather City Vending's entire argument rested on the federal constitution. There was simply no other contested issue before the Tax Commission.

In *Dow Jones & Co. v. State ex rel. Oklahoma Tax Comm'n*, 787 P.2d 843, 845 (Okla. 1990), this Court agreed that the Oklahoma Tax Commission, an administrative agency, did not have the authority to strike down a statute for unconstitutionality. Instead, the Commission's authority is limited to administering and enforcing the tax laws, which are considered constitutionally valid until a court of competent jurisdiction decides otherwise. *Id.* There, the plaintiff asserted that the application of a particular tax statute unconstitutionally infringed upon First Amendment rights. This Court agreed and reversed the Commission's ruling assessing a Tax.

Our case differs from *Dow Jones* in one significant way: The issue raised by the parties here involves both a question of constitutionality and a question of jurisdiction. The two issues are not coextensive. While on some occasions, such as the one at bar, a constitutional question

may also involve a question of jurisdiction, this is not always the case. Simply because an agency is without authority to determine a constitutional question does not necessarily deprive the agency of jurisdiction to hear any of the other issues raised. *See, e.g., Dow Jones*, 787 P.2d at 845. In this particular case, however, the only issue was the constitutionality of the state's act in taxing the tribal sales of cigarettes. As we will see from the cases cited later, states lack jurisdiction to impose taxes on certain Indian tribal activities. Thus, if we find that the Tax Commission acted contrary to the Indian Commerce Clause, it will necessarily follow that the Commission was without jurisdiction over the subject matter, and the order will be void *ab initio*. U.S. Const. Art. 1, Sec. 8, Cl. 3; *see also Scoufos*, 280 P.2d 723. To make this determination we must address the substantive question of subject matter jurisdiction.

II. SUBJECT MATTER JURISDICTION: STATE TAXATION OF INDIAN TRIBES AND TRIBAL ACTIVITIES

A. THE CONTROL BY CONGRESS UNDER THE COMMERCE CLAUSE

The governing of Indian tribal affairs falls under the broad power given to Congress in the Commerce Clause "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" U.S. Const. Art. 1, Sec. 8, Cl. 3; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). In respecting this authority, the Congress and the Supreme Court have adhered to the traditional policy of "leaving Indians free from state

jurisdiction and control" in order to protect tribal sovereignty. *Rice v. Olson*, 324 U.S. 786, 789 (1945).

This congressional authority and the semi-independent status of Indians has given rise to two separate but related barriers to the assertion of state jurisdiction in Indian affairs. *White Mountain*, 448 U.S. at 142; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1972). First, the exercise of state jurisdiction may be pre-empted by federal law. *White Mountain*, supra; *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973). Second, the state's exercise of jurisdiction may infringe on the right of the Indians to "make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

> The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important backdrop against which vague or ambiguous federal enactments must always be measured. (Citations Omitted) *White Mountain*, 448 U.S. at 142.

B. STATE TAXATION OF TRIBAL CIGARETTE SALES TO (1) TRIBAL MEMBER PURCHASERS AND (2) NON-MEMBER PURCHASERS

While these two barriers remain strongly intact, it can no longer be argued that the Indian Commerce

Clause automatically bars all state intervention, especially in the area of taxation. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15; *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 157 (1980); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 481 (1976). In the narrow arena of state taxation, the general rule remains that state tax law is not applicable to tribal activities and tribal members except where Congress has expressly provided that the state may assume jurisdiction. *McClanahan*, 411 U.S. at 170-171. The only exception to this rule is that which was best summarized in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 (1986):

> "[U]nder certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-332 (1983) (footnotes omitted). Both *Moe v. Confederate Salish and Kootenai Tribes*, 425 U.S. 463 (1976), and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), are illustrative. *In those decisions we held that, in the absence of express congressional permission, a State could require tribal smokeshops on Indian reservations to collect state sales tax from their non-Indian customers,* (Emphasis Added)

Thus, in the area of state taxation of Indian tribal activities and tribal members, Congress must expressly cede jurisdiction to the state before taxation is allowed. *Id.* at 215 n.17. The narrow exception to this rule is when the state asserts jurisdiction over some particular tribal activities involving non-Indians and non-tribal members. *Rice*

v. Rehner, 463 U.S. 713, 731 (1983). *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983). In such an instance, it is unnecessary to have an express grant of authority. *Colville*, 447 U.S. at 156-57; *Cabazon*, 480 U.S. at 215-16. But even is such an instance, "such authority may be asserted only if not pre-empted by the operation of federal law." *Id.*

The leading cases which illustrate the exception referred to in *Cabazon* are *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) and *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976). In *Moe*, Indian retailers were arrested for failure to have a cigarette license and for the sale of unstamped cigarettes. The Indian retailers challenged the state's actions, arguing that the state of Montana did not have jurisdiction to impose its taxation statutes upon them. The Supreme Court agreed and held that as to Indian purchasers the state could not impose its tax because it lacked jurisdiction. The Court said:

> "[T]he vendor license fee sought to be and applied to a reservation Indian conducting a cigarette business for the tribe on reservation land, and the *cigarette sales tax by Indian to Indian*, conflict with the Congressional statutes which provide the basis for decision with respect for such impositions." *Moe* at pp. 480, 481.

But the Court reached a different result as to non-Indian purchasers, and determined that the smokeshop was required to collect state taxes on those sales to non-Indians.

In *Colville*, the state of Washington attempted to tax the cigarettes sold by Indian retailers in federally-licensed tobacco outlets. The Supreme Court upheld the right of the state to tax those on-reservation cigarette purchases by non-members and non-Indians. Relying on *Moe*, the Court pointed out that a state may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation, especially if the legal incidence of the tax falls upon the non-Indian purchaser.

The tribe argued that state taxation was pre-empted by federal law, pre-empted by the tribal involvement in the taxation of cigarette sales, and inconsistent with the principle of tribal self-government. Again the Supreme Court disagreed because there was no direct conflict between state and tribal taxation:

> We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere. *Colville* at 155.

Balancing the tribe's interest in being self-governing and their reliance on revenue from cigarette sales against the state's legitimate interest in raising revenues, the state's interest was found to outweigh that of the tribe, because the tax was reasonably designed to prevent the tribe from only marketing an exemption to those who would otherwise purchase cigarettes from Non-Indian merchants. *Id.* at 157.

In 1985, the Supreme Court further refined the holding of *Colville* in *California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985). In *Chemehuevi*, the tribe brought suit to challenge the state's taxation of cigarettes sold by the tribe to non-Indian purchasers. The Ninth Circuit Court of Appeals held that *Colville* did not allow taxation of non-Indian purchasers in California, because the state taxation scheme did not expressly impose liability on the ultimate non-Indian consumer. *Id.* at 10-11. The Supreme Court disagreed, holding that *Colville* was applicable in this situation because the *incidence of that tax fell on the non-Indian purchaser*, the ultimate consumer. *Id.* at 12. The Court made clear that in order to tax the non-Indian purchases the state law was *not* required to expressly state that the incidence of the tax was to fall on the non-Indian consumer. Instead, it was sufficient if after review of the taxation scheme, the tax burden fell on the consumer if the vendor was not taxable.

Our review of Supreme Court case law indicates that the special area of taxation of cigarette sales is separate and distinct from the general taxation and regulation imposed by the states. This was made clear in *Cabazon Band*, 480 U.S. at 216. In *Cabazon*, the Supreme Court was confronted with the state's attempt to enforce its regulations on bingo games conducted by the tribe. The tribe argued that state regulation was prohibited because Congress had not expressly granted jurisdiction to California. Relying on *Colville* and *Moe*, the state urged that an express grant of jurisdiction was not required and its regulations could be applied without interfering with the

"traditional notions of Indian sovereignty and the congressional goal of Indian self-government." *Id.* at 216. There, however, the Supreme Court held that *Colville* and *Moe* were inapplicable because those cases dealt with a situation in which the tribes were marketing an exemption rather that creating a service or value on Indian country. The Cabazon Band was not simply marketing an exemption, but instead had built modern facilities and were "generating value on the reservations through activities in which they have a substantial interest." *Id.* Thus, the Court refused to allow the state to interfere with Indian bingo.

Cabazon makes clear that the general rule that state laws cannot be imposed on tribes absent express authority from Congress continues to be in effect, and that the exception to this rule is very limited. While the exception has not been specifically limited to situations involving *the tribal sales of cigarettes* to non-members and non-Indians, the Supreme Court has not extended the exception, and has been very clear in pointing out that extension will not be done without careful consideration of the traditional roles of the federal government and the tribes, and the interest of the state. *Rice v. Rehner,* 463 U.S. at 431.

We now turn to the present case. In the order of the Tax Commission, the administrative law judge did not distinguish between sales made to Indian tribal members and sales made to non-members and non-Indians. Instead, the judge validated all taxation of the cigarettes, relying upon 68 O.S. 1981 §§ 301-325. Clearly, applying the law of *Moe,* at 480, the tribal sales of cigarettes made to tribal members may not be taxed by the State of Oklahoma, as Oklahoma is without jurisdiction to do so.

Only the federal and tribal government may impose taxes in this situation. There is no room for dispute on this point.

However, the wholesaler urges that the Commission may not tax tribal cigarette sales regardless of who purchases them. For this proposition, it attempts to distinguish *Colville* on the basis of a recent Tenth Circuit Court of Appeals case, *Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Commission*, 888 F.2d 1303 (10th Cir. 1989). In *Citizen Band*, the Oklahoma Tax Commission attempted to collect taxes assessed on the sales of cigarettes by Potawatomis.

The Tenth Circuit held that such taxes were not allowed, regardless of whether the purchaser was a tribal member or a non-tribal member. In reaching this conclusion, the court reasoned that only congress can give the states jurisdiction to impose taxes on tribes, and that there was no independent jurisdictional grant of authority from Congress. Although the states asserted that taxes could be assessed on those sales made to non-Indians and non-members under *Colville*, The Tenth Circuit refused to allow such taxes, stating that *Colville* was inapplicable because Oklahoma did not assert jurisdiction under Public Law 280.[1]

The United States Supreme Court, however, in its opinion just released this February 26th, overruled the Tenth Circuit, *Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Commission*, ___ U.S. ___ (1991). It noted that Public Law 280 has never been held independently sufficient to confer on a state full taxing authority over Indians, and went to hold specifically that although the

state of Oklahoma may not tax sales to tribal members, it is free to require the collection of sales tax on sales of cigarettes to non-members of the tribe.

For these reasons, we disagree with the contention that taxes may not be assessed regardless of purchaser. We conclude and hold that first *Colville* and now *Citizens Bank Potawatomi* permit state taxation of cigarettes sold by a tribal smokeshop to non-Indians and non-tribal members, as long as such taxation is not pre-empted by federal law. *See also Rice v. Rehner,* 463 U.S. at 430-31.

C. PRE-EMPTION OF STATE TAXATION

Even though we have determined that state taxation of non-Indians and non-members is not automatically precluded by the Indian Commerce Clause, we still must consider the question of pre-emption. State jurisdiction may only be asserted if not pre-empted by the operation of federal law. *Cabazon,* 480 U.S. at 215-16; *Rice,* 463 U.S. at 720-21 n.7. "Decision in this case turns on whether state authority is pre-empted by the operation of federal law; and '[s]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interest reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.' " *Cabazon,* 480 U.S. at 216, quoting *Mascalero,* 462 U.S. at 333-34.

As described in *Rice,* 463 U.S. at 718-19, the trend is away from the idea of tribal sovereignty as a bar to state jurisdiction and toward a reliance on federal pre-emption. However, pre-emption analysis requires use of traditional notions of tribal sovereignty as a "backdrop against

which the applicable treaties and federal statutes must be read." *McClanahan*, 411 U.S. at 172. If it is determined that tradition has recognized a sovereign immunity in favor of the Indians, we must be hesitant to infer that Congress has intended to allow state interference. If we find no such tradition, or if after a balance of the state, tribal and federal interests involved, we find that the weightier interest requires, "our pre-emption analysis may accord less weight to the 'backdrop' of tribal sovereignty." *Rice*, 463 U.S. at 720.

Pre-emption itself is a concept that, when used in the context of Indian law, is not bound by notions of pre-emption that have emerged in other areas of law. *White Mountain*, 448 U.S. at 143. State jurisdiction is pre-empted by federal regulation if it interferes or is incompatible with federal and tribal interests, unless the state interests at stake are sufficient to justify the assertion of state authority. *New Mexico*, 462 U.S. at 334. In order for state authority to be pre-empted, it is not necessary that Congress make an express statement to that effect. *White Mountain*, 448 U.S. at 144. Rather, consideration to the intent of the Congress by review of the federal statutory scheme is the central focus. *See, e.g., Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 838-39 (1982). A state seeking to apply its laws to the activities between tribes and non-members must point to more than a general interest in raising revenues. *New Mexico, supra*. However, the state's interest is strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services. *Colville*, 447 U.S. at 157.

Here, City Vending cites no federal statutes which could arguably pre-empt the application of state taxing

laws. In fact, City Vending agrees that "the state is still free to assess taxes when the tribe makes a sale to a retail 'smoke shop' in the same manner as the states in the above cited federal supreme court [sic] rulings." Appellant's Brief at 12. After review, we have found no federal statutes which operate to pre-empt the state in the area of taxation of cigarette sales to non-Indians and non-members. *See Colville,* 447 U.S. at 134. The interest of the state is the indistinguishable from that of Washington in *Colville:*

> While the tribes do have an interest in raising revenues for essential governmental programs that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. *The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation values and when the taxpayer is the recipient of state services. As we have already noted, Washington's taxes are reasonably designed to prevent the Tribes from marketing their tax exemption to nonmembers who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservations.* (Emphasis added) *Id.*

Here, Oklahoma's interest is at its strongest insofar as the tax is directed at sales of cigarettes to non-members and non-Indians, and these purchasers undoubtedly receive state services. The corresponding interest of the Tribe is less significant, as the Tribe is merely seeking to market an exemption. Thus, we find that state taxation in this particular circumstance is not pre-empted by federal and tribal law.

D. LEGAL INCIDENCE OF THE CIGARETTE TAX: THE ULTIMATE PURCHASER

Our next consideration involves the question of the "legal incidence of the tax." *See Chemehuevi*, 474 U.S. at 290. As we noted before, an express statement that the tax is to fall on the ultimate purchaser is not required in order to tax tribal sales to non-tribal purchasers. Instead, we look to the statutory scheme to determine who will ultimately pay the tax. *Id.* Under 68 O.S.Supp.1984 §302, the Oklahoma legislature expressly stated that the tax on cigarettes shall be passed on to the ultimate consumer:

> The impact of the tax levied by the provisions of this article is hereby declared to be on the vendee, user, consumer, or possessor of cigarettes in this state, and, when said tax is paid by any other person, such payment shall be considered as an advance payment and shall thereafter be *added to the price of the cigarettes and recovered from the ultimate consumer or user.* In making a sale of cigarettes in this state, a wholesaler or jobber may separately state and show upon the invoice covering such sale the amount of tax paid on the cigarettes sold. (Emphasis Added)

From a reading of this statute, it becomes apparent that City Vending's status as a wholesaler rather than a retailer is immaterial. The important fact is that the tax burden is passed on to the ultimate consumer. Again, *Colville* is indistinguishable from the present case.

CONCLUSION

Under the rules of *Moe*, *Colville*, and *Citizens Band Potawatomi* we conclude that the State of Oklahoma, via the Oklahoma Tax Commission, does have subject matter jurisdiction to assess taxes against those sales made by

tribal smokeshops to non-Indian and non-member customers. However, the Commission is without jurisdiction to assess taxes on those sales made to tribal members. The Commission's order does not distinguish between sales to tribal members and those to non-Indians and non-members; rather it validates *all* taxes assessed against City Vending on the basis that the state taxing statutes, without regard to federal case law, appears to support the taxing of such sales. The Tax Commission did not have the jurisdiction to tax 211 such sales alike, and therefore we must conclude that its order is void on its face. *See Russell v. State,* 488 P.2d 1264, 1268 (Okla. 1971). Our holding does not extend or change the proposition that agency orders may be subject to collateral attack if it appears from the face of the record that the agency lacked subject matter jurisdiction to render the order; it merely applies the longstanding rule. *See Valley,* 254 U.S. at 353; *Mayfield,* 369 P.2d at 463.

The opinion of the Court of Appeals is hereby vacated. The order of the Oklahoma Tax Commission is likewise vacated as being void *ab initio,* the Judgment of the District Court of Muskogee County is reversed, and this cause is remanded for vacation of the permanent injunction rendered in that Court.

Opinion by:
SUMMERS, J.;
HODGES, VCJ.,
LAVENDER, DOOLIN and
HARGRAVE, JJ., concur;
KAUGER, J., concurs specially;
OPALA, CJ.,
SIMMS and
WILSON, JJ., dissent.

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[1] There is no dispute between the parties that City Vending is a wholesaler according to the definition in 68 O.S. 1981 § 301(c):

(c) The term "wholesaler" and/or "jobber" is defined to mean and include a person, firm or corporation organized and existing, or doing business, primarily to sell cigarettes to, and render service to retailers in the territory such person, firm or corporation chooses to serve; that purchases cigarettes directly from the manufacturer; that at least seventy-five percent (75%) of whose gross sales are made at wholesale; that handles goods in wholesale quantities and sells through salesmen, advertising and/or sales promotion devices; that carries at all times at his or its principal place of business a representative stock of cigarettes for sale, and that comes into the possession of cigarettes for the purpose of selling them to retailers or to persons outside or within the State who might resell or retail such cigarettes to consumers.

[2] The Citizen Band Potawatomie Indians of Oklahoma holds a letter to that effect from the Oklahoma Tax Commission dated May 3, 1978. For the result of related litigation see *Citizen Band Potawatomie Indians v. Oklahoma Tax Commission*, 888 F.2d 1303 (10th Cir. 1989), also referred to later herein.

[3] Neither the Court of Appeals opinion nor the Commission in its brief specifies which time limitation was not followed by City Vending, and in its brief, City Vending does not dispute the Commission's allegation of untimeliness. After review of the record, it appears that the "untimeliness" argument centers around whether City Vending was required to appeal within thirty days of the "proposed assessment" issued on May 31, 1985, or within thirty days of the "final assessment" issued on October 22, 1985. We do not address this question in light of our resolution, and because City Vending agrees that the appeal from the Tax Commission action was untimely under 68 O.S. 1981 §226.

[4] 68 O.S. 1981 §226 provides in pertinent part:

(a) In addition to the right to a protest assessment as authorized by Section 221 of this title, a right of action is

hereby created to afford a remedy to a taxpayer aggrieved by the provisions of this article or of any other state tax law, or who resists the collection of or the enforcement of the rules or regulations of the Tax Commission relating to the collection of any state tax; however, such remedy shall be limited as prescribed by subsection (c) of this section.

(b) Within thirty (30) days from the date of mailing to the taxpayer of an assessment for taxes or additional taxes pursuant to Section 221 of this title by the Tax Commission, any such taxpayer shall pay the tax to the Tax Commission, and at the time of making such payment shall give notice to the Tax Commission of his intention to file suit for recovery of such tax. The taxpayer shall not be required to file suit within such thirty-day period in order to prosecute an action as authorized by this section; however, failure to file such suit within one (1) year from the date of mailing of the assessment shall result in the assessment becoming final and absolute. . . .

(c) This section shall afford a legal remedy and right of action in any state of federal court having jurisdiction of the parties and the subject matter. It shall be construed to provide a legal remedy in the state or federal courts by action at law only in cases where the taxes complained of are claimed to be an unlawful burden on interstate commerce, or the collection thereof violative of any Congressional Act or provision of the Federal Constitution, or in cases where jurisdiction is vested in any of the Courts of the United States. . . .

[5] Public Law 280, found in 18 U.S.C. 1162 and 28 U.S.C. 1360, is a congressional act which allowed the states to assume extensive jurisdiction over crimes committed in Indian Country, and limited jurisdiction over some civil matters. In order to assume jurisdiction, the states were required to take affirmative action. Oklahoma did not take any affirmative action to assume jurisdiction.

[6] In *State v. Brooks*, 763 P.2d 707 (Okla. Crim.App. 1988), *cert. denied*, 109 S.Ct. 1769 (1989), the Oklahoma Court of Criminal Appeals reached a conclusion similar to the one reached by this Court. In *Brooks*, an Indian retailer was arrested and charged with violating the Cigarette Tax Act. The court held that the OTC did have jurisdiction to assess a tax against

those sales made to non-Indian and non-members. The court also recognized that reasonable record keeping procedures could be imposed on the tribes to insure that these sales were recorded. However, the court affirmed the trial court's dismissal of the actions because the information did not specifically limit the charges to those sales made to non-Indians and non-members.

KAUGER, J., (with whom Doollin, J. joins, concurring specially) The United States Supreme Court, the Oklahoma Tax Commission, and this Court have grappled with this problem.[1] On February 26, 1991, the United States Supreme Court decided *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 59 U.S.L.W. 4137 (February 26, 1991) ___ U.S. ___ (1991). The Court held that the state may collect taxes on sales to non-tribal members, but that in the absence of an express waiver by the tribe, suit against the tribe is barred by the doctrine of sovereign immunity which prohibits suits against tribes in non-tribal courts over activities on Indian land. The Court also held – Indian Country is Indian country – regardless of whether it is located on a reservation or on trust lands.[2]

Interestingly enough, even though Oklahoma is not a P.L. 280 state, the United States Supreme Court rejected the notion that its decisions in *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed. 2d 10 (1980), *reh'g denied,* 448 U.S. 911, 101 S.Ct. 25, 65 L.Ed. 2d 1172 (1980); *Moe v. Salish & Kootenai Tribes,* 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed. 2d 96 (1976), were based on those state's assumption of jurisdiction under P.L. 280. The Court said that while P.L. 280 permits a State to assume jurisdiction over civil matters in Indian Country, it does not confer on the State the full range of regulatory authority. In a retrenchment from *Colville* and *Moe,* this holding significantly reduced the authority of P.L. 280 states.

Nevertheless, Congress continued to recognize that such a distinction exists – and it is Congress which is granted the plenary constitutional power to deal with the

Indian tribes and nations.[3] The latest pronouncement of the United States Congress clearly indicates that it does recognize the P.L. 280 difference insofar as criminal jurisdiction over tribal affairs is concerned. The Congress amended the Defense Budget on October 24, 1990, to address an emergency situation in Indian country which resulted because of the holding of the Supreme Court in *Duro v. Reina*, ___ U.S. ___, 110 S.Ct. 2053, 109 L.Ed2d 693 (1990). Congress said:

> "Reversing two hundred years of the exercise by tribes of criminal misdemeanor jurisdiction over all Indians residing on their reservations, the Court held that tribes had lost their inherent power to exercise criminal misdemeanor jurisdiction over Indians who commit criminal misdemeanors on tribal lands but are not members of the tribe upon whose reservation the misdemeanors were committed. In at least twenty states with substantial Indian populations, the Court's decision has created a jurisdictional void in which neither a tribe, a state, or the Federal government is exercising jurisdiction over crimes committed by non-tribal member Indians in Indian country.
>
> Unless authority to exercise jurisdiction in Indian country is delegated to the states by the Federal government and assumed by the states, as has been done in eleven states pursuant to the provision of Public Law 83-280, states do not have jurisdiction over crimes committed by or against Indians in Indian country."[4]

Evidently, taxes have not been collected in any of the cases in which the Court has found that cigarette taxes

should be levied on non-tribal members,[5] because Congress has not given the states power to tax Indian tribes,[6] nor has it authorized suits to enforce tax assessments.[7] Notwithstanding the pronouncements of the United States Supreme Court, even the P.L. 280 states have been unable to collect the taxes.

A significant portion of the *Citizen Band* argument before the United States Supreme Court dealt with how taxes would be enforced and collected. The Court enumerated some alternatives suggesting that it had not held that individual agents or officers of tribes were not liable for damages in actions brought by the state. However, the immunity afforded Indian tribes is coextensive with that of the United States. Albeit officials and agents of Indian tribes do not have the same immunity as the tribe itself, tribal immunity extends to such persons when they act in their representative capacity and within the scope of their authority.[8]

After reiterating that suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or by congressional abrogation of sovereign immunity, another option was proffered by the Court. It suggested that "a mutually satisfactory regime" might be negotiated between Indian tribes and Indian nations which exercise sovereign authority over their members and territories, and the sovereign state of Oklahoma. The Court cited 48 Stat. 987, as amended, 25 U.S.C. §476 (1988).[9] This section deals with the organization of Indian tribes and their constitution and by-laws. Subsection (e) provides that in addition to all powers vested in any

Indian tribe or tribal council by existing law, tribal constitutions shall also vest the tribe with the right to negotiate with federal, state, and local governments.

In 1988, Oklahoma passed S.B. 210 recognizing tribal sovereignty and the unique status of Indian Tribes.[10] Under this legislation, codified as 74 O.S.Supp. 1989 §1221, "a spirit of cooperation" with all federally recognized tribes became the official policy of the state of Oklahoma. Pursuant to 74 O.S.Supp. 1988 §1222, the Oklahoma Legislature created a Joint Committee on State-Tribal Relations to oversee and to approve agreements between the tribal governments and the State of Oklahoma. Negotiation of intergovernmental cooperative agreements to address issues of mutual interest between the state and the federally recognized tribes may provide a logical solution[11] to the problems presented here.[12]

Because of its uncertainty concerning the alternatives it had discussed concerning collection of taxes, the *Citizens Band* Court concluded by stating:

> "And if Oklahoma and other States similarly situated find none of these alternatives produce the revenue to which they are entitled, they may of course seek appropriate legislation from Congress."

Obviously, this is a question for Congress – not for the judiciary.[13] In the interim, as the United States Supreme Court observed in *Cotton Petroleum Corp. v. New Mexico*, ___ U.S. ___, 109 S.Ct. 1698, 1707, 104 L.Ed.2d 209, 226 (1989), ambiguities in taxation laws concerning federal consent to tax are, as a rule, resolved in favor of tribal independence.[14]

[1] It is of historic interest to note that taxation on the sale of cigarettes has been a problem for more than a century. On March 20, 1874, the Secretary of Interior wrote a letter in response to a trial judge's finding that revenue laws applied to the selling of tobacco as well as to the manufacturing or producing thereof. The letter provides:

> DEPARTMENT OF THE INTERIOR
> Washington, D.C. March 20th, 1874
>
> Sir: On the 6th instant, you submitted to the Department a copy of a letter, dated the 27th ultimo, from the office of the Superintendent of Indian Affairs at Lawrence, Kansas, informing the Indian Bureau that the collector of Internal Revenue had demanded payment of license from John Whitetree, a Seneca Indian, for selling tobacco, in the Indian territory, and asked to be informed if the revenue laws applied to the *selling* of tobacco as well as to the manufacturing or producing thereof?
>
> The question was presented to the Commissioner of Internal Revenue in a letter of the 9th instant, and a copy of his reply thereto, dated the 18th instant, is herewith transmitted, from which you will observe that the Commissioner does not give his own construction to the laws in relation to that subject, but states that Judge Wm. Story of the Western District of Arkansas, has decided that under the provisions of Section 107 of the Act of July 20, 1863, the liability to pay a special tax attached to persons *selling* as well as to persons, manufacturing tobacco and that said decision will be accepted by the Commissioner of the Internal Revenue as a proper construction of said law until it is set aside or overruled by a higher Court.
>
> I am of the opinion that the provisions of Sec. 107 of the Act above referred to only imposes a tax upon the manufactured articles therein named, and not upon their sale, and it is suggested that measures be

> taken to treat the question as to the legality of the Act of the Collector of Internal Revenue in the case of John Whitetree, before the proper court, in a manner which will bring the case before the Supreme Court of the United States.
>
> Very respectfully
> /s/C. Delano, Secretary."

[2] See, *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Comm'n*, 768 P.2d 359, 366 (Okla. 1988) (Kauger, J., with whom Opala, C.J., joined, concurring).

[3] The United States Const. Art. 1, §8, cl. 3 provides:

"The Congress shall have Power . . .

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

[4] The amendment was attached to the defense bill in response to the United States Supreme Court opinion in *Duro v. Reina*, ___ U.S. ___, 110 S.Ct. 2053, 109 L.Ed. 2d 693 (1990), which according to Congress reversed two hundred years of criminal misdemeanor jurisdiction over Indians who commit these misdemeanors on Indian reservations. Traditionally, the tribes have exercised criminal misdemeanor jurisdiction over all Indians on their reservations. After *Duro*, Congress stated that no governmental entity has criminal misdemeanor jurisdiction over misdemeanor committed by Indians on Indian reservations.

[5] United States Law Week – Daily Edition, January 8, 1991.

[6] *Cotton Petroleum Corp. v. New Mexico*, ___ U.S. ___, 109 S. Ct. 1698, 1707, 104 L.Ed.2d 209, 226 (1989).

[7] *Oklahoma Tax Comm. v. Citizen Band Potawatomi Indian Tribe*, 59 U.S.L.W. 4137, 4139-40 (February 26, 1991) ___ U.S. ___ (1991).

[8] *Evans v. McKay*, 869 F.2d 1341, 1348 (9th Cir. 1989); *Kennerly v. United States*, 721 F.2d 1252, 1259 (9th Cir. 1983). While both *Evans* and *Kennerly*, recognize the rule that officials and agents of an Indian tribe do not have the same immunity as the

tribe itself, they do acknowledge that tribal immunity *nevertheless* extends to individual tribal officials while acting in their representative capacity and within the scope of their authority. Although the United States Supreme Court wrote in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106, 115-16 (1978) that an officer of a tribe is not protected from the tribe's immunity from suit, it recognized that subjecting such a leader to suit in a foreign forum can unsettle a tribal government's ability to maintain authority. Therefore, the Court stated that it would "tread lightly in the absence of legislative intent." The Supreme Court's approach led to a finding that the tribal official was not subject to suit in district court in absence of specific legislative authority. In its recent decision in *Citizen Band*, see note 7, supra, the Supreme Court again recognized that the most effective alternative may be to seek appropriate legislation to solve the problem of actual collection of the cigarette tax.

[9] Title 25 U.S.C. §476 (1988) provides in pertinent part:

> "(e) Vested rights and powers; advisement of pre-submitted budget estimates
>
> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and *to negotiate with the Federal, State, and local governments.* The Secretary shall advise such tribe or its tribal council of all appropriation estimates of Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress." (Emphasis supplied.)

[10] Title 74 O.S.Supp. 1989 §1221 provides:

"A. The State of Oklahoma acknowledges federal recognition of Indian Tribes recognized by the Department of Interior, Bureau of Indian Affairs.

B. The State of Oklahoma recognizes the unique status of Indian Tribes within the federal government and shall work in a spirit of cooperation with all federally recognized Indian Tribes in furtherance of federal policy for the benefit of both the State of Oklahoma and Tribal Governments.

C. The Governor, or his named designee, is authorized to negotiate and enter into cooperation agreements on behalf of this state with federally recognized Indian Tribal Governments within this state to address issues of mutual interest. Such agreements shall become effective upon approval by the Joint Committee on State-Tribal Relations. If such agreements involve trust responsibilities, approval by the Secretary of the Interior or his designee shall be required.

D. The governing board of the political subdivision of this state is authorized to negotiate and enter into intergovernmental cooperative agreements in behalf of the political subdivision, with the federally recognized Indian Tribal Governments within this state to address issues of mutual interest. Such agreements shall be effective upon approval by the Joint Committee on State-Tribal Relations and the Governor, or his named designee."

[11] This is not a novel idea. In 1989, New York and the Seneca Nation entered into an agreement on the collection of sales taxes on gasoline and diesel. The Tribe agreed to impose their own tax on the products which was still lower than what a non-Indian business could charge its customers. The Tribe agreed to be responsible for keeping all tax records. "N.Y., Seneca Nation Reach Novel Accord on Collection of 'Gas', Diesel Taxes," Platt's Oilgram News, Jan. 9, 1989,at 4.

On September 4, 1990, the State of Connecticut was ordered by the Second Circuit Court of Appeals to enter into

good faith negotiations for the creation of a tribal-state compact governing casino-type gambling. *Mashantucket Pequot Tribe v. Connecticut,* 913 F.2d 1024, 1032 (2nd Cir. 1990).

The Tulalip Tribes in Washington have reached a tentative agreement for a compact on gambling. Negotiations are being conducted in Oregon as well. California, Nevada, South Dakota, Nebraska, Oklahoma, Wisconsin, Connecticut, and Minnesota have compacts with the tribes in their state regarding gambling. Lobos, "Casino Plains Draw Legislative Fire", The Seattle Times, March 5, 1991, at D1; Johnson, "Indians in Connecticut Get Casino Gambling", The New York Times, October 26, 1990, Section B, Page 1, Column 2.

[12] On July 12, 1990, the Comanche Tribe entered into a compact with the State of Oklahoma. The compact allows the tribe to construct and operate a Horse Racing facility in Lawton without having to hold a county election and the State agreed not to impose or to collect any tax on the connected activities.

[13] The dissent relies upon *City Vending of Muskogee v. Oklahoma Tax Comm'n,* 898 F.2d 122 (10th Cir. 1990), for the proposition that a cigarette tax may be imposed on all cigarettes distributed to the tribal retailer, subject to a later credit for retail sales made to members of the tribe. This might work if the tribes agree to such an imposition.

[14] The dissenting opinion finds that the Tax Commission's assessment should be upheld because it was merely an excessive order. It is clear from the majority opinion that if a mixed question of constitutional and non-constitutional law were presented, this argument might prevail. However, if as in the instant cause, a purely constitutional question is presented to an agency, the agency is without jurisdiction to resolve the issue *Dow Jones & Co. v. State* ex rel *Oklahoma Tax Comm'n,* 787 P.2d 843, 845 (Okla. 1990). The dissenting opinion goes on to provide the solution for collection of cigarette taxes which the Supreme Court was unwilling to do in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* see note 7, supra. The Supreme Court said:

"In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complains that, in effect, decisions such as *Moe* and *Colville* give them a right without any remedy. There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. See *Ex parte Young*, 209 U.S. 123 (1908). And under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, *Colville*, supra, at 161-162, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, *City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122 (CA10 1990). States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax. See 48 Stat. 987, as amended, 25 U.S.C. §476.And if Oklahoma and other States similarly situated find that none of these alternatives produce the revenues to which they are entitled, they may of course seek appropriate legislation from Congress."

This Court is not free to conclude, as the dissent would have us do, that Congress would have intended for states to interfere indirectly with congressional regulation of commerce among the Indian tribes when states cannot do so directly. See, *Wisconsin Dept. v. Gould Inc.*, 475 U.S. 282, 289-90, 106 S.Ct. 1057, 1063, 89 L.Ed. 2d 223, 229-30 (1986).

OPALA, CJ., (with whom Simms, J., joins, dissenting)

The court holds a Tax Commission assessment *facially void* because the agency stands powerless to collect a cigarette tax on cigarettes sold to tribal members, though it may collect a cigarette tax on cigarettes sold to non-Indians and Indians of other tribes. The *facial* defect is said to lie in the Commission's failure to "distinguish [on the face of the assessment] between sales to tribal members and those to non-Indians and non-members. . . . " The court pronounces that since the agency "did not have the jurisdiction to tax all such sales alike . . . its order is void on its face." I view this conclusion as a *non sequitur.* At most, the assessment in question might be viewed as partly *excessive* or improperly burdened by the presence of an unauthorized levy component. The flaw is not apparent from the face of the proceeding and does not vitiate the entire assessment. It provides *no* foundational support for today's condemnation of the assessment as *facially void* for want of subject matter jurisdiction. The Commission clearly *has cognizance* to assess a cigarette excise tax against a *nontribal* wholesaler who distributes unstamped cigarettes to tribal retailers. See Part II of this opinion.

Even if the agency action could be perceived as an adjudication *in excess* of the Commission's *unquestionable* power to levy a cigarette excise tax,[1] it is nonetheless facially *valid* and hence impervious to a collateral attack. I would leave the assessment undisturbed and treat it as a final agency action that is now beyond the reach of this court's reviewing cognizance.

I

THE DISTINCTION BETWEEN EXCESS AND ABSENCE OF JURISDICTION

The law observes the distinction between *excess* of and the *absence* of jurisdiction over a given subject matter.[2] In the latter circumstances, judicial power to act at all is simply wanting.[3] For example, if a probate court having authority over only wills and decedent's estates should conduct a criminal trial, its jurisdiction to decide any issue in the case is without doubt entirely absent. On the other hand, when the authority to deal with a certain subject does exist, the *manner and extent* of the power's exercise may be *excessive.*[4] If a court invested with general jurisdiction over criminal cases should find a particular act to be a public offense when by law it clearly is not, or should sentence a defendant to eleven years imprisonment, when the maximum prescribed by statute is ten, the decision is deemed to have been *in excess* but not in the absence of the court's jurisdiction.[5]

These examples serve to distinguish the *absence* of jurisdiction from its *excess.* In this case we are concerned mostly with the *consequences* flowing from those terms. When the complete *absence* of jurisdiction appears on the fact of the judgment roll (or from an inspection of the agency proceedings)[6], the court's ruling is, of course, *void* and subject to vacation at any time.[7] In contract, an *excessive* exercise of cognizance does *not make the decision subject to collateral attack.*[8] The latter court's action "is *Valid until set aside,* and parties may be precluded from setting it aside by . . . waiver, estoppel, or the passage of

time."[9] Jurisdiction is merely exceeded when a statute is misinterpreted or authority is exercised erroneously.[10] If extrinsic evidence is needed to show the *absence* of jurisdiction, then the decision is *not* facially flawed.[11] These distinctions are firmly rooted in Oklahoma's jurisprudence[12] and applicable to agency ruling.[13]

II

THE TAX COMMISSION HAS COGNIZANCE TO ASSESS A CIGARETTE EXCISE TAX AGAINST NON-TRIBAL WHOLESALERS WHO DISTRIBUTE UNSTAMPED CIGARETTES TO TRIBAL RETAILERS

State courts have inherent authority over any federal-law claim not expressly withheld from their jurisdiction by an act of Congress.[14] Tribal sovereign immunity claims based on federal law must yield to this nation's dual sovereignly scheme and its duel court system, *Oklahoma Tax Commission v. Graham;*[15] *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma.*[16] In *Graham* the Court held that a tribal sovereign immunity counterclaim, pressed in a state suit to enforce a tax assessment against an Indian tribe for cigarette sales and bingo receipts, is not removable to a federal court but can be cognizable in state courts. *Potawatomi* teaches that tribal immunity deprives neither state administrative institutions of their power to tax tribal sales of goods (cigarettes) to nontribal members nor state courts of their authority to enforce the tax through equitable remedies. There, the Court notes that while the Tribe's sovereign immunity bars the state from pursuing its most effective direct remedy to collect the taxes (a lawsuit against the

Tribe), alternative remedies exist. Individual tribal members employed in the Indian smokeshops may not claim tribal immunity. In short, *states are free to collect cigarette taxes from the wholesalers on unstamped cigarettes supplied to tribal stores.*[17] Oklahoma's own decisional law foreshadowed *Potawatomi.* It had held a Tribe's immunity from taxes does not extend to tribal activities or transactions with nontribal members.[18]

While the federal government shares its tax immunity[19] with the Indian tribes (for whose benefit the government holds reservation lands in trust),[20] this immunity does not *ipso facto* extend to private entities doing business with the government.[21] Under the now repudiated "intergovernmental tax immunity doctrine",[22] a state government could not tax income that an individual directly derived from any contract with the federal government. Today, unless Congress has expressly or impliedly acted to preempt state taxation, "a State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, *even though the financial burden of the tax may fall on the United States or tribe*".[23] (Emphasis mine.) Unless federal legislation were to preempt the levy, the rise of the new doctrine would make a lessee's oil production from Indian land amenable to state taxation.[24]

The Oklahoma taxing regime requires wholesalers, jobbers and warehousemen to pay a cigarette excise tax on all cigarettes that come into their possession for use or consumption in the state.[25] Payment of the tax is evidenced by stamps which must be affixed to the cigarette package before it is sold for further distribution.[26] The wholesaler's *withdrawal of the cigarettes from storage for sale*

or distribution marks the taxable event.[27] The *excessive payment* of taxes clearly is built into this state's collection process. This is so because the taxable event happens before the cigarettes are either sold or distributed. When statutorily required to affix the stamps, the nontribal wholesaler cannot ascertain whether the ultimate consumer will be a tribal member.[28] A cigarette tax must consequently be paid on (and is added to the price of) all cigarettes distributed to the tribal retailer, *subject to a later credit for retail sales made to members of the tribe.*

The Tax Commission audited this nontribal wholesaler and assessed taxes against it on all cigarettes distributed by that entity without a tax stamp. While the statutory scheme contemplates that the incidence of the tax fall ultimately on the consumer (because the cigarette tax paid by the wholesaler *must be added to the price of cigarettes* supplied to the retailer,[29] this fact alone will not clothe a *nontribal party* with immunity from the tax burden *for* its transactions with Indian tribes.[30] Whether Congress has granted tax immunity to *nontribal cigarette wholesalers* requires an examination of relevant federal legislation with the history of tribal sovereignty serving as a backdrop to that process.[31]

Our statutory scheme for collecting cigarette excise taxes is consistent with the U.S. Supreme Court's pronouncement in *Citizens Band.*[32] There, the Court, citing *City Vending of Muskogee v. Oklahoma Tax Comm'n,*[33] *gave its imprimatur* to the state's regime of collecting cigarette excise taxes by assessing wholesalers who supply unstamped cigarettes to tribal stores. The facts in *City Vending* and those in this case are nearly identical. They both affect the same parties and the same type of tax

assessment (a cigarette excise tax). While that case dealt with a different issue – federal-court jurisdiction under the Bankruptcy Code[34] over state tax liability issues – the Court's reference to *City Vending* clearly denotes its renewed approval of the statutory assessment process for collecting cigarette excise taxes from wholesalers who distribute unstamped cigarettes to Indian tribes.

In sum, state courts have jurisdiction of tribal claims to enjoin tax assessments on federal-law grounds as well as of suits by the state for equitable relief against Indian Tribes.[35] State regulatory institutions have cognizance to collect cigarette excise taxes from *nontribal wholesalers* – who supply unstamped cigarettes to tribal stores – on cigarettes ultimately sold to nontribal members. *The excise of state taxing authority's power is not jurisdictionally infirm merely because the assessment failed to demonstrate facially that a distinction was observed between tribal and nontribal sales in a cigarette tax assessment against the nontribal wholesaler.*

CONCLUSION

Here, there is no dispute that the Tax Commission has the authority to assess cigarette taxes against the appellant-wholesaler. The agency also has the power generally to adjudicate the protest against the assessment if the levy is indeed shown to have been excessive by improper inclusion of tribal sales. *The tax authority's failure to show facially that tribal and nontribal sales were treated distinctly neither makes the assessment facially infirm nor unveils an absence of jurisdiction.*

The appellant clearly urges, and the court holds, the Tax Commission may have *exceeded* its authority if it included in its assessment an amount allegedly attributable to sales exempted from taxation by federal law. But if this were indeed true, the exercise of such unauthorized power is, at most, an act *in excess* of jurisdiction. Because the Tax Commission's assessment *is not facially void for want of subject matter jurisdiction,* but instead may have been tainted by an *excessive exercise of taxing power,*[36] *it is now too late* to disturb the agency's ruling by today's pronouncement.

This case presents no analogy to situations in which the Tax Commission is confronted with a taxpayer's challenge to the constitutionality of a revenue statute and can do nothing to afford relief. in *Dow Jones & Co v. State Ex rel. Tax Com'n*[37] we held that an administrative agency is powerless to pass on the constitutional validity of a challenged state statute. That pronouncement poses no impediment to the Tax Commission's capacity for testing its own jurisdiction *sua sponte* or when it is questioned by the taxpayer. *Dow* neither abridges nor alters the ancient legal norm that makes *every tribunal,* judicial or administrative, not only *competent but also duty-bound* to inquire *sua Sponte* into its own jurisdiction.[38]

I would hence hold that the Tax Commission had subject matter jurisdiction to assess taxes against the appellant and that its challenged assessment, even if excessive, is facially valid.

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[1] See 68 O.S. Supp. 1984 §302; 68 O.S. 1981 §§308(a) and 315, *infra*. Section 302 provides in pertinent part:

> "There is hereby levied upon the sale, use, . . . possession, or consumption of cigarettes within the State of Oklahoma a tax. . . . * * * Such tax shall be evidenced by stamps which shall be furnished by and purchased from the Tax Commission or by an impression . . . by the use of a metering device when authorized by the Tax Commission . . . and said stamps or impression shall be securely affixed to one end of each package. . . . "

The pertinent terms of §308(a) are: " * * * The Commission shall be responsible for the custody and sale of the stamps, and for the disposition of the proceeds thereof. * * * "

"*For the purpose of enabling the Oklahoma Tax Commission to determine the tax liability* of a . . . wholesale dealer . . . , it shall have the right to inspect any premises where cigarettes are . . . stored, [or] sold . . . and to examine all of the records required herein to be kept. . . . " (Emphasis added.) 68 O.S. 1981 §315.

[2] Bradley v. Fischer, 80 U.S. (13 Wall.) 335, 351-352, 20 L.Ed. 646, 651 (1872); Stump v. Sparkman, 435 U.S. 349, 356, 98 S.Ct. 1099, 1105, 55 L.Ed.2d 331 (1978).

[3] State v. Williams, 245 N.W. 663, 665 (Wis. 1932).

[4] *The manner and extent* of an exercise of adjudicative authority are two factors which are as appropriate for a tribunal's determination as any other issue in the proceeding. Bradley v. Fisher, *supra* note 2, 80 U.S. (13 Wall.) at 352, 20 L.Ed. at 651; State v. Williams, *supra* note 3 at 665.

The distinction between "excess" and "absence" of judicial jurisdiction is equally applicable to agency cognizance. If the Department of Public Safety were to press before itself as an agency criminal charges for the crime of driving under the influence, the Department's authority to so prosecute would, without a doubt, be found entirely *absent*. On the other hand its authority to revoke a driver's license is statutorily present. The

manner and extent of the latter power's exercise would determine whether it was *excessively* applied. Similarly here, the Tax Commission, which has authority to correct, adjust or abate an erroneous audit, is acting within its cognizance, although the assessment may ultimately be held *excessive*. 68 O.S. Supp. 1989 §221(b) and (e).

[5] See Bradley v. Fisher, *supra* note 2, 80 U.S. (13 Wall.) at 351, 20 L.Ed. at 651.

[6] For an application of the distinction to agency decisions, see the authorities cited *infra* note 36.

[7] 12 O.S. 1981 §1038; Hough v. Hough, Okl., 772 P.2d 920, 921 (1989); Mayhue v. Mayhue, Okl., 706 P.2d 890, 895 (1985); Scoufos v. Fuller, Okl., 280 P.2d 720, 723 (1955).

[8] State v. Williams, *supra* note 3 at 665; People v. Ruiz, 265 Cal.Rptr. 886, 892 (Cal.App. 3 Dist. 1990).

[9] People v. Ruiz, *supra* note 8 at 892.

[10] Neither legal error nor excess of jurisdiction operates to render a judicial act facially void. Woodrow v. Ewing, Okl., 263 P.2d 167, 171 (1953). *See also* Schucker v. Rockwood, 846 F.2d 1202, 1204 (9th Cir. 1988); Robrock v. Robrock, 151 N.E.2d 234, 239 (Ohio App. 1956) (error in a ruling is not synonymous with a decision rendered either in the absence of or in excess of jurisdiction).

[11] Scoufos v. Fuller, *supra* note 7 at 721 (the court's syllabus ¶2); Hough v. Hough, *supra* note 7 at 921.

[12] See Salaney v. Ferris, 201 Okl. 236, 204 P.2d 270, 273 (1949), where the court held that a judicial act in *excess* of jurisdiction is not facially invalid. This principle has been consistently applied in other cases. *see e.g.*, Taylor v. Dale, 201 Okl. 519, 207 P.2d 789, 789-790 (1949); Allison v. Howell, 204 Okl. 404, 230 P.2d 706, 709 (1951); State ex re. Hunt v. Green, Okl., 508 P.2d 639, 642 (1973).

[13] See authorities cited *infra* note 36.

[14] Yellow Freight System, Inc. v. Donnelly, 494 U.S. ___, 110 S.Ct. 1566, 1568, 108 L.Ed.2d 834 (1990); Tafflin v. Levitt, 493 U.S. ___, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990); sell also McLin v. Trimble, Okl., 795 P.2d 1035, 1045 (1990) (Opala, V.C.J., dissenting).

[15] ___ U.S. ___, 109 S.Ct. 1519, 1521, ___ L.Ed.2d ___ (1989).

[16] ___ U.S. ___, 111 S.Ct. 905, 912, ___ L.Ed.2d ___ (1991).

[17] Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, *supra* note 16, ___ U.S. at ___, 111 S.Ct. at 912.

[18] State ex rel. May v. Seneca-Cayuga Tribe, Okl., 711 P.2d 77, 92 (1985).

[19] Absent express congressional authorization, a state cannot tax the United States directly. *See* McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579 (1819); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, ___, 109 S.Ct. 1698, 1707, 104 L.Ed. 2d 209 (1989). Federal immunity from state taxation is based on the Supremacy Clause of the United State Constitution, Art. 5, cl.2, U.S. Const. *See* South Carolina v. Baker, 485 U.S. ___, 108 S.Ct. 1355, 1364 n. 10, 99 L.Ed.2d 592 (1988); Massachusetts v. United States, 435 U.S. 444, 455, 98 S.Ct. 1153, 1161, 55 L.Ed.2d 403 (1978).

[20] Cotton Petroleum Corp. v. New Mexico, *supra* note 19, 490 U.S. at ___,109 S.Ct. at 1707; Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764, 105 S.Ct. 2399, 2402, 85 L.Ed.2d 753 (1985).

[21] Cotton Petroleum Corp. v. New Mexico, *supra* note 19, 490 U.S. at ___, 109 S.Ct. at 1707.

[22] The intergovernmental tax immunity rule was based on the rationale that any tax on income a party received under a government contract was a tax on the contract and thus a tax "on" the government because it burdened the government's power to enter into the contract. South Carolina v. Baker, *supra* note 19, 485 U.S. at ___, 108 S.Ct. at 1363; *Cotton Petroleum, supra* note 19, 490 U.S. at ___, 109 S.Ct. at 1706, 1707. The doctrine of intergovernmental tax immunity reached its zenith in Gillespie v. Oklahoma, 257 U.S. 501, 42 S.Ct. 171, 66 L.Ed. 338 (1922), where the Court applied the doctrine to invalidate a state tax on income derived by a non-Indian lessee from the sale of his interest in oil produced on Indian land. In *Cotton* the Court observed that after *Gillespie* the doctrine "started a long path in decline and has now been 'thoroughly repudiated' by modern case law." *Cotton, supra* note 19, 490 U.S. at ___, 109

S.Ct. at 1706, citing *Baker, supra* note 19, 485 U.S. at ___, 108 S.Ct. at 1365.

[23] Cotton Petroleum Corp. v. New Mexico, *supra* note 19, 490 U.S. at ___, 109 S.Ct. 1707; South Carolina v. Baker, *supra* note 19, 485 U.S. at ___, 108 S.Ct. at 1365-1366.

[24] Cotton Petroleum Corp. v. New Mexico, *supra* note 19, 490 U.S. at ___, 109 S.Ct. at 1707; South Carolina v. Baker, *supra* note 19, 485 U.S. at ___, 108 S.Ct. at 1364-1366. After *Gillespie, supra* note 22, was squarely overruled in Helvering v. Mountain Producers Corp., 303 U.S. 376, 386-387, 58 S.Ct. 623, 627-628, 82 L.Ed. 907 (1938), "Oil and gas lessees operating on Indian reservations were subject to nondiscriminatory state taxation as long as *Congress did not act affirmately to pre-empt the state taxes." Cotton, supra* note 19, 490 U.S. at ___, 109 S.Ct. at 1706 (emphasis added). See also Apache Gas Products Corp. v. Oklahoma Tax Com'n, Okl., 509 P. 2d 109, 114-115 (1973).

[25] 68 O.S.Supp. 1984 §302, *supra* note 1; 68 O.S. 1981 §305. The terms of 68 O.S. 1981 §305(a) provide in pertinent part:

> "Every wholesaler . . . doing business within this State and required to secure a license . . . shall, *upon withdrawal from storage, and before making any sale or distribution for consumption thereof,* cause the same to have affixed thereto the stamp or stamps as required this Article. . . . " (Emphasis mine.)

[26] 68 O.S.Supp. 1984 §302, *supra* note 1.

[27] 68 O.S. 1981 §305(a), *supra* note 25.

[28] The problem of an *excessive payment of cigarette tax* was not present in Washington v. Confederated Tribes of Colville, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed. 2d 10 (1980), because all the Indian tribes purchased their cigarettes from out-of-state dealers. Three of the tribes functioned as retailers and retained possession of the cigarettes until they were sold to consumers; a fourth tribe acted as a wholesaler and sold cigarettes to its licensed retailers. The Washington State taxing scheme allowed the Indian tribes to possess unstamped cigarette for resale to tribal members, but required them to collect both the cigarette excise tax and retail sales tax on purchases of cigarettes by nonmembers. Unlike the nontribal wholesaler here, the tribes

in *Colville could easily distinguish between tribal and nontribal sales when the taxable event happened.*

[29] 68 O.S. Supp. 1984 §302, *supra* note 1.

[30] Cotton Petroleum Corp. v. New Mexico, *supra* note 19, 490 U.S. at ___, at 109 S.Ct. at 1707.

[31] See in this connection Cotton Petroleum Corp. v. New Mexico, *supra* note 18, 490 U.S. at ___, 109 S.Ct. at 1707, where the Court notes that whether tax immunity shall be conferred on a non-Indian lessee's oil production on Indian lands " 'is essentially legislative in character,' " quoting Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342, 365-366, 69 S.Ct. 561, 573-574, 93 L.Ed. 721 (1949).

[32] Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, *supra* note 16, ___ U.S. at ___, 111 S.Ct. at 912.

[33] 898 F.2d 122 (10th Cir. 1990).

[34] 11 U.S.C. §505.

[35] In Oklahoma Tax Com'n. v. Citizen Bank Potawatomi Indian Tribe of Oklahoma, *supra* note 16, ___, U.S. at ___, 111 S.Ct. at 913, Justice Stevens notes in his concurring opinion that "the Court's holding in effect rejects the argument that this governmental entity – the Tribe – is completely immune from legal process. By addressing the substance of the Tax Commission's claim for prospective relief against the Tribe, the Court today recognizes that a tribe's sovereign immunity from actions seeking money damages does not necessarily extend to actions seeking equitable relief."

[36] In Gulfstream Petroleum Corp. v. Layden, Okl., 632 P.2d 376, 378 (1981), this court initially extended the common-law teaching of "facial invalidity" to an administrative order of the Corporation Commission. For further elaboration of the *Golfstream* rule see Kaneb Production Co. v. GHK Exploration Co., Okl., 769 P.2d 1388, 1392 (1989); Mullins v. Ward, Okl., 712 P.2d 55, 60 (1985). Because the common law's facial invalidity doctrine now applies to an agency's adjudicative exercise of administrative process, *I would today infuse into its outer parameters, as indeed we must, the distinction between excess and absence of jurisdiction.*

[37] Okl. 787, P.2d 843, 845 (1990).

[38] This court must inquire *sua sponte* into its jurisdiction as well as into the jurisdiction of the court whence the appeal came. See Cate v. Archon Oil Co., Inc. Okl., 695 P.2d 1352, 1356 (1985). *Every agency* acting in an adjudicative capacity must similarly determine its own jurisdiction. Special Idem. Fund v. Quinalty, 201 Okl. 204, 203 P.2d 713, 714-715 (1949); Special Indem. Fund of State of Okl. v. Hunt, 200 Okl. 1, 190 P.2d 795-797-798 (1948); Federal Power Com'n v. Louisiana Power & Light Co., 406 U.S. 621, 647, 92 S.Ct. 1827, 1842, 32 L.Ed.2d 369 (1972).

NOT FOR PUBLICATION

THE COURT OF APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

OKLAHOMA TAX COMMISSION, Appellee, versus CITY VENDING OF MUSKOGEE, INC., Appellant.	C-85-1706 Case Number 65,602 (Filed May 22, 1989)

APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY, OKLAHOMA

HONORABLE WILLIAM BLISS, JUDGE

AFFIRMED

Jon Tom Staton,
Muskogee, Oklahoma, For Appellant,

Robert Jenkins,
Oklahoma City, Oklahoma, For Appellee.

MEMORANDUM OPINION

Opinion by PATRICIA DOUGHERTY MacGUIGAN, Judge:

Appellant appeals from the order of the District Court of Muskogee County enjoining and restraining Appellant from receiving or selling cigarettes within the State of Oklahoma without having a valid cigarette

wholesale dealer's license issued by Appellee (Commission). The Commission revoked and cancelled the cigarette wholesale dealer's license of Appellant on October 22, 1985. The Commission's order was entered after two administrative hearings before an administrative law judge. Appellant did not appeal the Commission's order revoking Appellant's license and that order became final on November 21, 1985. On October 30, 1985, the Commission filed a petition for injunctive relief in the District Court of Muskogee County alleging that the license to sell cigarettes issued to Appellant had been revoked and that Appellant continued to sell cigarettes in violation of state law. Appellant did not deny that it continued to sell cigarettes after its license was revoked but alleged that the Commerce Clause of the United States Constitution allows such sales to Indian tribes, and that the accounting required by the Commission was burdensome on interstate commerce and therefore illegal. The trial court granted the injunctive relief requested by Appellee and enjoined Appellant from selling cigarettes without a valid cigarette wholesale dealer's license.

I.

The record reveals that Appellant's license to sell cigarettes was cancelled and yet Appellant continued to sell cigarettes. These facts were admitted by Appellant. The trial court therefore did not abuse its discretion in granting the injunction. *Board of Regents v. National Collegiate Athletic Assoc.*, 561 P.2d 499 (Okl. 1977); *Amoco Production Co. v. Lindley*, 609 P.2d 733 (Okl. 1980). We hold that the trial court's decision to grant the injunctive relief

was not against the clear weight of the evidence. *Johnson v. Ward,* 541 P.2d 182 (Okl. 1975).

II.

Appellant asserts that 68 O.S. 1981 § 226 is an available remedy to challenge the Appellee's order revoking the Appellant's cigarette wholesale dealer's license. After the Commission revoked Appellant's license, Appellant attempted to appeal the order to the district court pursuant to 68 O.S. 1981 § 226, and additionally sought a declaratory judgment from the district court on the merits of the constitutional claim. The Commission moved for dismissal in that case asserting that the limitations time had foreclosed the § 226 appeal and that 12 O.S. 1981 § 1657 was a bar to review the administrative decision by a declaratory judgment. The district court rejected the Commission's motion to dismiss. The Commission then obtained a writ of prohibition from the Supreme Court of Oklahoma prohibiting the district court from proceeding in the case stating that the limitations period had expired under 68 O.S. 1981 § 226. A final order was issued in the Oklahoma County District Court case on March 17, 1986 in *Oklahoma Tax Commission v. Honorable Joe Cannon, District Judge,* Cause No. 65916.

The Commission asserts that § 226 does not create a right of appeal nor does it include actions involving the revocation of a license. The heading of § 226 states the intent of the section to be "Action to Recover Taxes as Additional Remedy to Aggrieved Taxpayer." We hold that this additional remedy applies only to taxes and not

to license revocations as is evidenced by the language of subsections (a) and (c) which provide:

> (a) In addition to the right to appeal to the Supreme Court provided for in the preceding section, a right of action is hereby created to afford a remedy to any taxpayer aggrieved by the provisions of this article or of any other state tax law, or who resists the collection of or the enforcement of the rules or regulations of the Tax Commission relating to the collection of any state tax.
>
> (c) This section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and the subject matter. It shall be construed to provide a legal remedy in the state or federal courts by action at law in cases where the taxes complained of are claimed to be an unlawful burden on interstate commerce, or the collection thereof violative of any Congressional Act or provision of the Federal Constitution, or in cases where jurisdiction is vested in any of the Courts of the United States. In all actions brought hereunder service of process upon the Chairman of the Tax Commission shall be sufficient service, and the Tax Commission shall be the sole, necessary and proper party defendant in any such suit, and the State Treasurer shall not a necessary or proper party thereto.

III.

Appellant next asserts that the Commission order revoking Appellant's license was void for lack of jurisdiction. The Commission's jurisdiction and authority, however, to revoke or cancel a license previously issued by the Commission was never raised by Appellant. The jurisdiction and authority to revoke or cancel a license is granted under 68 O.S. 1981 § 212 and § 324. Appellant's contention is that the admitted sales of unstamped cigarettes to an Indian tribe, as a retailer, are protected by the Commerce Clause of the United States Constitution and is a matter of defense to a proposed revocation. Such defense does not pertain to the jurisdiction of the Commission to hear the cause or enter an order revoking or cancelling a license. That Commerce Clause defense proposed by Appellant, if it was raised and denied on the merits, could have been presented on appeal to the Supreme Court from the Commission's order revoking Appellant's license. 68 O.S. 1981 § 225. However, no appeal was taken by Appellant. Even assuming that the Commission's order revoking Appellant's license was error, an erroneous decision is as binding as a correct one if no appeal is taken therefrom. *Conoco, Inc. v. State ex rel. Department of Health,* 651 P.2d 125 (Okl. 1982).

Appellant, failing to appeal the Commission's order revoking its license, is now attempting to collaterally attack such order. In order for the Commission order to be void and thereby subject to collateral attack, it must be void on its face. *Scoufus v. Fuller,* 280 P.2d 720 (Okl. 1955). The face of the order sets forth the issue to be determined and finds that the facts are undisputed. The order also

sets forth the applicable law. Therefore, having jurisdiction and authority to revoke Appellant's license after notice and hearing (68 O.S. 1981 § 212), the Commission entered its order which became final upon Appellant's failure to appeal therefrom. 68 O.S. 1981 § 225. Having become final and being valid on its face, we hold that the order revoking Appellant's license cannot now be challenged or overturned in a collateral proceeding.

IV.

Appellant asserts the Commerce Clause prohibits the taxation of cigarettes sold to Indian tribes for resale. However, as stated above, that issue should have been presented by way of appeal from the license revocation order and not in this collateral proceeding. We also note that this Commerce Clause issue has been presented by Appellant in an original action before the Supreme Court of Oklahoma in *City Vending of Muskogee, Inc. v. Oklahoma Tax Commission*, Case No. 66,219, which was an action filed by Appellant in district court seeking declaratory relief.

V.

Lastly, Appellant argues that because the Commission has recognized that Indian tribes are a proper entity for state tax exempt status, Commission should therefore be estopped from changing its position concerning Indian tribes' exempt status. This issue, however, is not contained in the petition in error filed by Appellant nor in its amended petition in error. Errors alleged in Appellant's brief which are not presented by the petition in error will

not be considered on appeal. *Martin v. Harrah Independent School District,* 543 P.2d 1370 (Okl. 1976).

AFFIRMED.

HUNTER, P.J. and HANSEN, J. concur.

IN THE DISTRICT COURT OF MUSKOGEE COUNTY
STATE OF OKLAHOMA

OKLAHOMA TAX COMMISSION, Plaintiff,	)	No. C-85-1706
vs.	)	(Filed Dec. 16, 1986)
CITY VENDING OF MUSKOGEE, INC., Defendant.	)	

JOURNAL ENTRY

This cause coming on for hearing this 27th day of November, 1985, before the Honorable William H. Bliss, Judge of the District Court in and for Muskogee County, Oklahoma, and the plaintiff being present by Robert C. Jenkins, attorney, and the defendant by Jon Tom Staton.

The Court having reviewed the files and records herein, and having heard the statements and arguments of counsel, and being fully advised in the premises, FINDS:

1. The following allegations of Plaintiff having been admitted in Defendant's answer, are hereby taken as true:

a. The Defendant is a corporation duly authorized to conduct business in the State of Oklahoma and is doing business within this State with its principal place of business located at 205 North Cherokee, Muskogee, Muskogee County, Oklahoma;

b. Prior to October 22, 1985, Defendant was the holder of a cigarette wholesale dealers license issued by the Oklahoma Tax Commission;

c. Said license was revoked and/or cancelled by Order of the Oklahoma Tax Commission in Order Number 86-10-22-40 dated October 22, 1985, after notice and hearing before the Oklahoma Tax Commission;

d. A true and correct copy of said Order was mailed to Defendant's attorney on October 22, 1985, and Defendant was personally served with a true and correct copy of said Order on October 30, 1985;

e. Defendant continues to sell cigarettes within the State of Oklahoma.

2. As of the date of this hearing, no appeal has been perfected from the Tax Commission's Order of October 22, 1985; and

3. That Plaintiff is entitled to the relief prayed for.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that a Defendant, City Vending of Muskogee, Inc., its servants, agents and all other persons acting by, through, or under its authority are enjoined and restrained form receiving or selling cigarettes within the State of Oklahoma without having a valid cigarette wholesale dealers license issued by the Oklahoma Tax Commission.

/s/ William H. Bliss
JUDGE OF THE
DISTRICT COURT

APPROVED AS TO FORM:

/s/ Robert C. Jenkins
Attorney for Plaintiff

/s/ Jon Tom Staton
Attorney for Defendant

BEFORE THE ADMINISTRATIVE LAW JUDGE
OF THE OKLAHOMA TAX COMMISSION,
STATE OF OKLAHOMA

IN THE MATTER OF THE	)	CASE NO.
CIGARETTE EXCISE TAX OF CITY	)	P-85-151
VENDING OF MUSKOGEE, INC.	)	SC-85-002

FINDINGS, CONCLUSIONS AND
RECOMMENDATIONS

NOW on this 3rd day of September, 1985, the above styled cause comes on for consideration, pursuant to assignment regularly made to the undersigned Administrative Law Judge by the Oklahoma Tax Commission and hearing had, at which hearing Protestant, City Vending of Muskogee, Inc., appeared by and through its attorney, Jon Tom Staton, and the Alcohol and Tobacco Division of the Oklahoma Tax Commission by and through Robert Jenkins, Attorney for the Oklahoma Tax Commission. Opening statements were made by the parties and exhibits, not itemized herein, were received into evidence. The parties agreed to combine the evidence and testimony of the Show Cause Hearing held June 24, 1985 in view of the fact the issue therein being identical to the issue in the protest lodged by the Protestant. Emery Lloyd Hensley, President of City Vending of Muskogee, Inc., testified on behalf of the Protestant. Closing arguments were than made by each party and the case was submitted.

STATEMENT OF FACTS

The Protestant, City Vending of Muskogee, Inc., is an Oklahoma corporation and a licensed Oklahoma wholesale cigarette dealer pursuant to the provisions of Article III of Title 68 of the Oklahoma States. On or about May 30, 1985, the Oklahoma Tax Commission, by and through the Commissioners, issued an Order and Notice to Show Cause docketed as "In the Matter of the Cancellation of the Wholesale Cigarette Dealer's License of City Vending of Muskogee, Inc.", File Number SC-85-002, wherein the Protestant was required to appear at the Oklahoma Tax Commission in Oklahoma City on June 24, 1985 at 10:00 a.m. at which time evidence would be presented in regard to the alleged violation and refusal of Protestant to comply with the provisions of Article III of Title 68 of the Oklahoma Statutes wherein the Protestant was alleged to have been selling cigarettes for consumption within the State of Oklahoma without affixing or causing to be affixed thereto cigarette tax stamps as required by the statutes of the State of Oklahoma.

Pursuant to the Notice to Show Cause, the Protestant appeared before Joe Mark ElKouri, Administrative Law Judge, on the 24th day of June, 1985 and a hearing was conducted at which time, following the taking of testimony and evidence, Protestant was allowed until July 5, 1985 to submit additional affidavits and/or documentation with the Court and the General Counsel's Office granted an additional one week in which to respond to said documents and/or affidavits if the General Counsel's office so desired. Subsequent to the filing of the affidavits by the Protestant, the Administrative Law Judge's office received a file from the General Counsel's

office setting Protest of City Vending of Muskogee, Inc., No. P-85-151, wherein notice from the Administrative Law Judge's office was forwarded to the Protestant dated July 9, 1985 setting the protest hearing down for July 24, 1985. On July 24, 1985, the protest hearing in the matter of the Protest of City Vending of Muskogee, Inc., Docket Number P-85-151, was held at which time the testimony and evidence admitted in the matter of the Order and Notice to Show Cause Hearing of June 24, 1985, docketed as SC-85-002, was combined and made a part of the protest of City Vending of Muskogee, Inc.

The protest at issue involves an assessment dated May 31, 1985 issued by the Alcohol and Tobacco Tax Division of the Oklahoma Tax Commission for cigarette excise taxes, penalty and interest in the total amount of Eighty-five Thousand Five Hundred Eleven Dollars and Eighty-three Cents ($85,511.83) against City Vending of Muskogee, Inc. This assessment was at the hearing amended to the amount of Eighty-three Thousand Seven Hundred Ninety-four Dollars and Forty-five Cents ($83,794.45) by agreement of the parties therein reflecting a payment by the Protestant of One Thousand Seven Hundred Seventeen Dollars and Thirty-eight Cents ($1,717.38) deducting such from the original amount of the assessment of Eighty-five Thousand Five Hundred Eleven Dollars and Eighty-three Cents ($85,511.83) issued on May 31, 1985. Additional exhibits were offered and received into evidence and arguments by counsels for the Protestant and the General Counsel's office representing the Alcohol and Tobacco Tax Division were made and the case was submitted for a decision.

The facts at issue in the protest of City Vending of Muskogee, Inc. are not in dispute, being that the Protestant has sold cigarettes to Indians and/or Indian tribes for resale within the State of Oklahoma and therein failing to affix thereto cigarette excise tax stamps as required by the laws of the State of Oklahoma.

ISSUES AND CONTENTIONS

Protestant contends that the sale of the cigarettes to Indian tribes for resale within the State of Oklahoma is exempt under the interstate commerce clause of the United States Constitution, as well as the fact that for the cigarette stamps to be affixed thereto in regard to the sale of those cigarettes to "Indian tribes" would unduly encumber and discriminate against the Protestant. (See Article I, Section 8, Clause 3 of the Constitution of the United States of America.)

It is the contention of the General Counsel's office that the laws of the State of Oklahoma in regard to the cigarette stamp tax are quite specific in that the exemptions are spelled out specifically and that exemption claimed by the Protestant is not found within the provisions of Title 68, Section 301 et seq. of the Oklahoma statutes.

APPLICABLE LAW

The Protestant has attempted to clothe himself with Constitutional protection throughout the evidence and testimony at the Show Cause Hearing held June 24, 1985, the Protest Hearing held July 24, 1985 and in all briefs

and documents filed until such case was submitted for findings, citing and contending that the actions of the Alcohol and Tobacco Division regarding the assessed cigarette stamp tax and the Notice to Show Cause why the cigarette wholesaler dealer's license should not be revoked and/or cancelled were in fact a violation of the interstate commerce and/or an undue burden on interstate commerce.

In view of the fact that the Oklahoma Tax Commission is an administrative agency created under the provisions of Section 102 of Title 68 of the Oklahoma Statutes and granted primary authority and jurisdiction pursuant to Section 203 of Title 68 of the Oklahoma Statutes, the Oklahoma Tax Commission has only that authority and jurisdiction vested in it by acts of the Oklahoma Legislature. The Oklahoma Legislature has provided for administrative hearings within the Oklahoma Tax Commission and has made provisions for appellate review by the Oklahoma Supreme Court of orders, rulings and/or findings of the Oklahoma Tax Commission, and in addition to the administrative proceedings before the Oklahoma Tax Commission, the Legislature has further created a right of the respective taxpayer to avail itself of the Oklahoma District Court when in fact the taxes complained of are alleged to be a burden on interstate commerce or that the collection thereof would be in violation of the acts of the United States Congress or in violation of the provisions of the United States Constitution. (See *Cimarron Industries, Inc. v. Oklahoma Tax Commission*, Okla. 621 P.2d 539 (1980).

The remedy for the contentions and/or assertions of the Protestant put forth within this protest are available to the Protestant pursuant to the provisions of Section

226(c) of Title 68 of the Oklahoma Statutes wherein the law provides a remedy where the taxes complained of are (1) an unlawful burden on interstate commerce, (2) violative to the acts of Congress or the United States Constitution; or (3) in cases where jurisdiction is vested in any of the courts of the United States.

The sole and only issue presented which the Oklahoma Tax Commission has jurisdiction to entertain is whether or not the Protestant has violated the provisions of Section 301 et seq. of Title 68 of the Oklahoma Statutes.

The undisputed facts reflect that the Protestant, an Oklahoma licensed wholesale cigarette dealer did in fact sell cigarettes to individuals, Indians and/or Indian tribes, for consumption within the State of Oklahoma without affixing or causing to be affixed thereto the required cigarette tax stamps. Protestant asserts that the sale of the unstamped cigarettes were to alleged sovereign "Indian tribes" and that as such were exempt from the provisions of Section 305 of Title 68 of the Oklahoma Statutes.

A review of the provisions of the Cigarette Stamp Tax Act, specifically Section 321 of Title 68 of the Oklahoma Statutes recite that,

> All cigarettes sold to Veterans Hospitals and state operated domiciliary homes for veterans located in the State of Oklahoma, for distribution or sale to disabled ex-servicemen or disabled ex-servicewomen interned in, or inmates of, such hospitals, or residents of such homes, and all sales to the United States are hereby exempt from the stamp excise tax levied by this article.

In view of the well established rule that tax exemption statutes are to be strictly construed against the person or entity asserting the exemption, the Oklahoma Tax Commission is not privileged to expand the exemption provided by the Legislature as per Section 321, supra. (*See Dairy Queen of Oklahoma, Inc. v. Oklahoma Tax Commission,* 238 P.2d 800 (1951); *London Square Village, Inc. v. Oklahoma County Equalization and Excise Board,* 559 P.2d 1224 (1976); and *Phillips Petroleum Company v. Oklahoma Tax Commission,* 542 P.2d 1303, (Okl. 1975).)

In view of the fact that the Protestant, a licensed wholesale cigarette dealer, did in act sell and distribute cigarettes for consumption within the State of Oklahoma without affixing or causing to be affixed thereto the cigarette tax stamps required by law to parties not recited within the specific provisions of Section 321, supra, said action was in direct violation of the provisions of the Oklahoma Cigarette Stamp Tax Act.

The law regarding violation of the provisions of Section 301, et seq. of Title 68 of the Oklahoma Statutes are also expressed in no uncertain terms at Section 324 of Title 68 of the Oklahoma Statutes wherein the section provides:

> All manufacturers, *wholesalers,* jobbers, retailers or other persons *selling* or *distributing* such cigarettes are hereby required to comply with the provisions of the three preceding sections, and the rules and regulations of the Oklahoma Tax Commission as to such sales or distributions, and failure or refusal to so comply shall constitute grounds for revocation of any license issued to such manufacturer, wholesaler, jobber,

retailer or other person, by the Oklahoma Tax Commission. (Emphasis added.)

The provisions of Sections 321 and 324 of Title 68 of the Oklahoma Statutes are neither vague nor ambiguous; the intent of the Legislature is plainly expressed in these two statutes and must be followed without further inquiry. (See *In the Matter of Hamm Production Co.*, 671 P.2d 50 (1983); and *State ex. rel Thompson v. Ekberg*, 613 P.2d 466 (1980).)

CONCLUSION

In view of the above findings of fact and conclusions of law, the Administrative Law Judge concludes as follows:

(1) That the Oklahoma Tax Commission has jurisdiction in this matter.

(2) That the Oklahoma Tax commission is without jurisdiction to determine the constitutional questions presented and asserted by the Protestant.

(3) That the Protestant has violated the provisions of Section 321 of Title 68 of the Oklahoma Statutes by selling and distributing cigarettes for consumption within the State of Oklahoma without affixing or causing to be affixed thereto the cigarette tax stamps required by law.

(4) That in view of the Protestant's violation of Section 321 of Title 68 of the Oklahoma Statutes, the cigarette wholesale dealers license of the Protestant should be cancelled and revoked pursuant to the provisions of Section 324 of Title 68 of the Oklahoma Statutes.

(5) That the assessment by the Alcohol and Tobacco Tax Division of the Oklahoma Tax Commission dated May 31, 1985 in the amount of Eighty-three Thousand Seven Hundred Ninety-four Dollars and Forty-five Cents ($83,794.45) is correct and proper and according to the law of the State of Oklahoma. That the cigarette stamp tax, penalty and interest as assessed is due and owing and any additional interest accrued and accruing thereon is due and owing until paid.

(6) That the Protest of City Vending of Muskogee, Inc. should be denied.

RECOMMENDATION

In view of the above and foregoing findings and conclusions, the Administrative Law Judge recommends to the Oklahoma Tax Commission that the Protest of City Vending of Muskogee, Inc. be denied, that the assessment of the Alcohol and Tobacco Tax Division of the Oklahoma Tax Commission is correct and proper, that the tax, penalty and interest accrued and accruing thereon is due and owing until paid, and that the cigarette wholesale dealers license of City Vending of Muskogee, Inc. be revoked and/or cancelled.

OKLAHOMA TAX COMMISSION
/s/ Joe Mark Elkouri
JOE MARK ELKOURI
Administrative Law Judge

FILED
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OFFICE OF THE CLERK

(2)

No. 92-627

In The
Supreme Court of the United States
October Term, 1992

CITY VENDING OF MUSKOGEE, INC.,
Petitioner,

v.

OKLAHOMA TAX COMMISSION,
Respondent.

On Petition For Writ Of Certiorari To The Supreme Court of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

STANLEY JOHNSTON
Deputy General Counsel
(Counsel of Record)

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BEST AVAILABLE COPY

QUESTION PRESENTED

Petitioner's state cigarette wholesaler's license was revoked by respondent Tax Commission, after a hearing, because of petitioner's sales of unstamped (untaxed) cigarettes to Indians and Indian tribes for resale. Petitioner had claimed its sales to Indian tribes were exempt from state taxation under the Indian Commerce Clause, but petitioner did not appeal the Tax Commission's decision. Thereafter, the Tax Commission sought and obtained an injunction in state court prohibiting petitioner from continued sales of cigarettes without a valid state license. On appeal, the Oklahoma Supreme Court held the unappealed revocation order was final and valid, and upheld the injunction.

The question presented is: Does the Indian Commerce Clause bar all state taxation of cigarettes sold to Indian tribes for resale, or provide a basis for collateral attack on the final and otherwise valid license revocation order?

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In The

Supreme Court of the United States

October Term, 1992

CITY VENDING OF MUSKOGEE, INC.,

Petitioner,

v.

OKLAHOMA TAX COMMISSION,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Respondent Oklahoma Tax Commission respectfully requests that the Court deny the petition for writ of certiorari, for the reason that the decision below does not conflict with applicable decisions of this Court, and no substantial or unsettled federal questions are presented.

OPINIONS BELOW

The opinion of the Oklahoma Supreme Court in this case is reported at 835 P.2d 97.

In a prior, related case between these same parties, *City Vending of Muskogee, Inc. v. Oklahoma Tax Commission*, 898 F.2d 122 (10th Cir. 1990), *cert. denied*,

111 S.Ct. 75 (1990) ("*City Vending I*"), arising out of petitioner's subsequent bankruptcy case, petitioner sought relief from the tax assessment portion of the same Commission order involved in this case. There, as here, petitioner contended that the Commission's order was void. That issue was decided against the petitioner.

JURISDICTION

The opinion below rests upon independent and adequate nonfederal grounds. The Oklahoma Supreme Court found that the order revoking petitioner's wholesale cigarette license for nonexempt sales of unstamped and untaxed cigarettes for resale within the state, entered by respondent Tax Commission after notice and hearing, was made by the state agency authorized by state law to hear and determine such matters; was valid on the face of the record; and, being unappealed, became final and binding under state law and not subject to collateral attack in the subsequent injunction action.

In the related case, dealing with the taxes assessed by the same Tax Commission order, the United States Court of Appeals for the Tenth Circuit reached the same conclusion. This Court denied review.

STATUTES INVOLVED

The relevant Oklahoma tax procedure statutes involved, OKLA. STAT. tit. 68, §212 (license revocations)

and §225 (appeals), are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

Petitioner, City Vending of Muskogee, Inc., was an Oklahoma-based cigarette wholesaler, and licensed by respondent Tax Commission for that purpose. Oklahoma imposes a tax on the sale of cigarettes for use or consumption within the state, the payment of which is evidenced by tax stamps affixed to each package of cigarettes sold. The tax is imposed on the ultimate consumer, but is collected initially from the wholesaler who is required to purchase the stamps from the Commission and affix them to the cigarettes prior to their first sale.

In May, 1985, after an audit, the Commission issued a proposed tax assessment against City Vending, and a notice of the Commission's intent to revoke City Vending's cigarette wholesaler's license, because of City Vending's in-state sale and distribution of large quantities of unstamped cigarettes. City Vending protested both the tax assessment and the proposed license revocation.

By agreement, the tax assessment and license revocation were combined into one proceeding, and a hearing was held before the Commission's administrative law judge. City Vending's defense was that all of the unstamped cigarettes in question had been sold to Indian tribes for resale by them, and that the Commerce Clause of the United States Constitution prohibited the State

from taxing those sales. This, according to City Vending, was true regardless of to whom the tribe later resold the cigarettes, or where. Thus, City Vending presented no evidence in the license revocation proceeding, nor is there any in the record below, as to the identity of the ultimate consumers of the cigarettes it had sold, or whether any such persons were exempt from tax.

After the hearing, the administrative law judge issued findings of fact and conclusions of law, and a recommendation that the tax protest be denied and City Vending's wholesale license be revoked. The Oklahoma Tax Commission adopted the findings, etc. of the administrative law judge as the Order of the Commission. Although entitled to appeal the Commission's order directly to the Oklahoma Supreme Court, City Vending failed to do so, and the order became final under state law.

City Vending continued selling cigarettes after its license had been revoked, and the Tax Commission instituted the instant proceedings in state court to enjoin City Vending from the further sale of cigarettes without a valid license. The injunction was granted and City Vending appealed.

In its appeal, City Vending argued that the Tax Commission's order revoking its license was void for lack of subject matter jurisdiction because the Commission had failed to rule on City Vending's Commerce Clause defense, and for the further reason that the Commerce Clause prohibited states from requiring cigarette

wholesalers to collect state tax on cigarettes sold to Indian tribes for resale. The Oklahoma Supreme Court rejected both contentions. First, the court observed that state law grants the Oklahoma Tax Commission the authority to issue, refuse to issue, suspend or cancel cigarette wholesaler's licenses, to conduct hearings relative thereto, and to enter binding orders thereon. The court further noted that all defenses raised before the Tax Commission—including defenses based on the United States Constitution or federal law—could be fully adjudicated by the court on direct appeal. In the absence of a direct appeal, the court found that the underlying revocation order could be collaterally attacked only if it appeared *from the face of the record* that the Commission's order was void for lack of jurisdiction. Since the Oklahoma Tax Commission has specific authority under state law to revoke City Vending's license, the court found no lack of subject matter jurisdiction.

Next, although it was unnecessary to a decision in the case, the court considered City Vending's argument that the Commerce Clause exempts all sales by a wholesaler to an Indian tribe. Following this Court's pronouncement in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S.Ct. 905 (1991), the court likewise rejected this argument. The court went on to observe that City Vending had not affirmatively demonstrated on the record that any of the tribes or Indians it sold to did not resell at the retail level, or that any resales were made to tribal members; and that the record, therefore, did not support any claim of exemption from state tax. The court did not, as petitioner suggests,

rule that the state could tax cigarettes ultimately sold to members of the reselling tribe. The court specifically recognized that such sales, *if shown*, would not be taxable. 835 P.2d at 101, Pet. App. at A-6. However, there was nothing in the record to establish such sales. *Id.*

Having thus concluded that the Commission's revocation order was final and not facially void, and there being no other claim of error or abuse of discretion on the part of the trial court, the injunction was upheld.

REASONS FOR DENYING THE WRIT

I.

The Questions attempted to be raised on this petition have already been decided against the petitioner by the Tenth Circuit in *City Vending I* and by applicable decisions of this Court.

Approximately a year after the Commission's order revoking City Vending's license and denying City Vending's protest to the tax assessment, City Vending filed a voluntary petition in bankruptcy in the Eastern District of Oklahoma. In the bankruptcy case, City Vending then filed an adversary proceeding against the Tax Commission, seeking a declaration that this tax assessment and a subsequent one made upon ensuing sales were void, and also seeking to recover the taxes paid on the first assessment. Unsuccessful, City Vending pursued an appeal to the United States Court of Appeals for the Tenth Circuit. *City Vending of Muskogee, Inc. v. Oklahoma*

Tax Commission, 898 F.2d 122 (10th Cir. 1990). There, as here, City Vending asserted that the Tax Commission lacked jurisdiction to tax City Vending's sales to Indian tribes, and that the Commission's order denying the protest and affirming the assessment was void. The Court of Appeals rejected this claim. It found that the Commission's order was not void and, the contested assessment having become final under state law prior to the bankruptcy petition's filing, could not be relitigated. *Id.* at 125. This Court denied review. 111 S.Ct. 75 (1990).

In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S.Ct. 905 (1991), this Court, *citing City Vending I*, specifically affirmed the authority of the states to require cigarette wholesalers to collect these taxes, and to assess the wholesaler for its failure to do so: "[U]nder today's decision, States may of course collect the sales tax from cigarette wholesalers, . . . by assessing wholesalers who supplied unstamped cigarettes to the tribal stores." *Id.*, at 912. Prior to *Citizen Band Potawatomi*, this Court had already disposed of petitioner's claim that the Indian Commerce Clause acts as a bar to all state taxation of cigarettes sold to Indian tribes for resale. *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 157 (1980) ("It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes.").

Clearly, the Tax Commission had the authority to require City Vending to collect the taxes in question.

Upon City Vending's failure to do so, the Commission had the authority and jurisdiction under state law to cancel petitioner's wholesale license. OKLA. STAT. tit. 68, §212 (1981); *Gibson Co., Inc. v. Oklahoma Tax Commission*, 180 Okla. 53, 68 P.2d 87 (1937).

II.

The decision below rests upon independent and adequate nonfederal grounds.

Although the court below considered petitioner's Commerce Clause claim and, consistently with the applicable decisions of this Court and of the Tenth Circuit Court of Appeals, rejected that claim, that consideration was unnecessary to a full and complete decision in this case. The decision below rested first and foremost upon whether or not the Commission's final order revoking City Vending's license was subject to collateral attack in the subsequent injunction action. This is a question of general, nonfederal law.

Cigarette wholesalers in Oklahoma are required to be licensed by the Oklahoma Tax Commission. OKLA. STAT. tit. 68, §304 (1981). The Tax Commission is authorized, after notice and hearing, to cancel such licenses for violations of the provisions of any state tax law. OKLA. STAT. tit. 68, §212 (1981). The Commission's order cancelling a license is appealable directly to the Oklahoma Supreme Court. OKLA. STAT. tit. 68, §225 (1981). City Vending received the required notice and hearing, had judgment rendered against it, and did not appeal. Under

Oklahoma law, that revocation order became final. *Conoco, Inc. v. State Dept. of Health*, 651 P.2d 125 (Okla. 1982).

In Oklahoma, as in other states and in the federal courts, a final judgment is not subject to collateral attack unless the judgment is void on its face. *Scoufus v. Fuller*, 280 P.2d 720 (Okla. 1955). The court here examined the record before it and concluded the Commission's order was not facially void. Although that conclusion was abundantly correct, *City Vending v. Oklahoma Tax Commission*, 898 F.2d at 125, whether it was right or wrong this Court need not determine. *Fox Film Corporation v. Muller*, 296 U.S. 207 (1935).

It is settled law that a judgment of a state court which is put upon a nonfederal ground, independent of the federal question involved and broad enough to sustain the judgment, will not be reviewed by this Court, unless the nonfederal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the federal question. *McCoy v. Shaw*, 277 U.S. 302, 303 (1928). *Shaw* dealt with a decision by the Oklahoma Supreme Court as to the adequacy of a remedy under state law. Here, the court dealt with the state-law validity of a final agency decision. As in *Shaw*, the nonfederal ground upon which the Oklahoma court here based its decision is predicated upon the court's earlier decisions, and is broad enough and substantial enough to sustain the judgment without reference to any federal question.

CONCLUSION

The decision below is in harmony with the decisions of this Court, and rests upon independent and adequate nonfederal grounds broad enough to sustain the judgment. The petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

Oklahoma Uniform Tax Procedure Code, Okla. Stat. tit. 68 (1981):

§212. Cancellation or refusal of license or permit

(a) The Tax Commission is authorized to cancel or to refuse the issuance, extension or reinstatement of any license, permit or duplicate copy thereof, under the provisions of any state tax law or other law, to any person, firm, or corporation who shall be guilty of:

(1) Violation of any of the provisions of this article;

(2) Violation of the provisions of any state tax law;

(3) Violation of the rules and regulations promulgated by the Tax Commission for the administration and enforcement of any state tax law, or

(4) Failure to observe or fulfill the conditions upon which the license or permit was issued, or

(5) Nonpayment of any delinquent tax or penalty.

(b) Before any license, permit or duplicate copy thereof may be canceled, or the issuance, reinstatement, or extension thereof refused, the Tax Commission shall give the owner of such license or permit, or applicant therefor, twenty (20) days' notice by registered mail or certified mail with return receipt requested, of a hearing before said Tax Commission, granting said person an opportunity to show cause why such action should not be taken.

(c) Upon the cancellation of any license, permit, or duplicate copy thereof by the Tax Commission, all accrued taxes and penalties, although said taxes and penalties are not, at the time of the cancellation, due and payable under the terms of the state tax law imposing or levying such tax or taxes, shall become due and payable concurrently with the cancellation of such license, permit or duplicate copy thereof, and the licensee or permittee shall forthwith make a report covering the period of time not covered by preceding reports filed by said person and ending with the date of the cancellation and shall pay all such taxes and penalties.

(d) The Tax Commission may enter its order temporarily suspending any license, permit or duplicate copy thereof pending a final hearing before it on the subject of the cancellation of such license, permit or duplicate copy thereof, and may give notice of such temporary suspension at the same time that notice of its intention to cancel any license, permit or duplicate copy or to refuse the issuance, reinstatement or extension thereof is given, as provided by this section. After being given notice of any such order of suspension, it shall be unlawful for any person to continue to operate his business under any such suspended license, permit or duplicate copy thereof, and in the event any such person shall continue or threaten to continue such unlawful operations after having received proper notice of the suspension of his license, permit or duplicate copy thereof, upon complaint of the Tax Commission such person shall be enjoined from further operating or conducting such unlawful business pending final hearing by the Tax Commission. In all cases where injunction

proceedings are brought under this article, the Commission shall not be required to furnish bond, and where notice of suspension of any license, permit or duplicate copy thereof has been given in accordance with the provisions of this section, no further notice shall be required before the issuance of a temporary restraining order.

§ 225. Appeals

(a) Any taxpayer aggrieved by any order, ruling, or finding of the Tax Commission directly affecting such taxpayer may appeal therefrom directly to the Supreme Court of Oklahoma. A taxpayer so desiring to appeal shall, within ten (10) days from the date of mailing to the taxpayer of any such order, ruling, or finding, file with the Tax Commission a written notice of his intention to appeal.

(b) Within thirty (30) days from the date of mailing to the taxpayer of the order, ruling, or finding complained of, the taxpayer desiring to appeal shall file in the office of the Clerk of the Supreme Court a petition in error specifying the grounds upon which such appeal is based. At the same time the taxpayer shall request that the Tax Commission prepare for filing with the Supreme Court, within thirty (30) days, the record of the appeal, certified to by the Secretary of the Tax Commission, and consisting of any citations, findings, judgments, motions, orders, pleadings and rulings, together with a transcript of all evidence introduced at any hearing relative thereto, or such portion of such citations, findings, judgments,

motions, orders, pleadings, rulings, and evidence as the appealing parties and the Tax Commission may agree to be sufficient to present fully to the Court the questions involved. Upon request of the taxpayer, the Tax Commission shall furnish him a copy of the proceedings had in connection with the matter complained of.

(c) As a condition precedent to the right of the taxpayer to prosecute such an appeal, and as a jurisdictional prerequisite of the Supreme Court to entertain such appeal, it is specifically provided that, if the appeal be from an order, judgment, finding, or ruling of the Tax Commission assessing a tax or an additional tax, penalties, and interest, the taxpayer shall pay to the Tax Commission the amounts assessed. If, upon a final determination of the appeal the order assessing such tax, penalties, and interest is reversed or modified and it is determined that said tax or part thereof was erroneously or illegally assessed, said amounts so paid by the taxpayer, together with the interest thereon at the rate of three percent (3%) per annum, shall be refunded to the taxpayer by the Tax Commission.

(d) Such refunds and interest thereon shall be paid by the Tax Commission out of monies in the Tax Commission clearing account from subsequent collections from the same source as the original tax assessment, provided that in the event there are insufficient funds for refunds from subsequent collections from the same source, the refund shall be paid by the Tax Commission from monies appropriated by the Legislature to the special refund reserve account for such purposes as hereinafter

provided. There is hereby created within the official depository of the State Treasury an agency special account for the Tax Commission for the purpose of making such refunds as may be required under this section, not otherwise provided. This account shall consist of monies appropriated by the Legislature for the purpose of making refunds under this section.

(e) In lieu of the cash payment provided for in the preceding paragraph, the taxpayer may file with the Tax Commission a bond in double the amount of the tax, additional tax, penalties and interest so assessed, conditioned that he will faithfully and diligently prosecute such appeal to a final determination, and in the event the order, judgment, ruling or finding of the Tax Commission be affirmed on appeal, will pay such tax, additional tax, penalties and interest, and costs so assessed against him.

(f) If the appeal be from an order, judgment, finding or ruling of the Tax Commission other than one assessing a tax and from which a right of appeal is not otherwise specifically provided for in this article, any aggrieved taxpayer may appeal from any such order, judgment, finding or ruling as provided in this section and may supersede the effect of such order, judgment, ruling or finding by filing with the Tax Commission a bond in an amount fixed by the Tax Commission payable to the State of Oklahoma conditioned that such appeal will faithfully and diligently be prosecuted to a final determination, and in the event the order, judgment, ruling or finding of the Tax Commission be affirmed on appeal, that such person will immediately conform thereto.

(g) This section shall be construed to provide to the taxpayer a legal remedy by action at law in any case where a tax, or the method of collection or enforcement thereof, or any order, ruling, finding or judgment of the Tax Commission is complained of, or is sought to be enjoined in any action in any court of this state or the United States of America.